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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

REPUBLIC OF ARGENTINA and PROVINCE OF TUCUMAN, ARGENTINA,

Petitioners,

v.

SUSANA SIDERMAN DE BLAKE, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "commercial activity" exception of the Foreign Sovereign Immunities Act confers jurisdiction over a suit against Argentina and one of its constituent Provinces (Tucumán) for the seizure and "intervention" of respondents' real estate by military authorities that governed the Province following the 1976 coup d'état in Argentina.

2. Whether the State of Argentina and the Tucumán Province waived their immunity from suit under the "tort exception" of the Foreign Sovereign Immunities Act for a tort in violation of international law (torture) committed in 1976 against an Argentine national in Tucumán Province, where five years after the tort victim took up residence in the United States, a Tucumán court requested a California State court to serve on the victim a document relating to a criminal proceeding instituted against him in Tucumán.

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SUSANA SIDERMAN DE BLAKE, *et al.*,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Republic of Argentina and the Province of Tucumán[1] petition the Court that a writ of certiorari issue to review the judgment rendered in this case by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Appendix A (App.1a-43a), is reported at 965 F.2d 699 (1992).

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[1] In compliance with Rule 29.1 of the Rules of this Court, Petitioners represent that the Republic of Argentina is a foreign State, and that the Province of Tucumán is a constituent province and a political subdivision of the Republic of Argentina.

The orders of the United States District Court for the Central District of California are not reported; they are reproduced below in Appendix B (App. 44a-45a), Order re Subject Matter Jurisdiction and Personal Jurisdiction of March 14, 1984; Appendix C (App. 46a-53a), Judgment by Default of September 28, 1984; and Appendix D (App. 54a-57a), Order Vacating Default Judgment and Dismissing Action of March 7, 1985.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1611, reads in relevant part as follows:

> § 1330. **Actions against foreign states**
>
> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

§ 1603. **Definitions**

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) . . .

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity" carried on in the United States by a "foreign state" means commercial activity carried on by such state

and having substantial contact with the United States.

§ 1604. **Immunity of a foreign state from jurisdiction**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter.

§ 1605. **General exceptions to the jurisdictional immunity of a foreign state**

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) . . .

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, de-

ceit, or interference with contract rights; . . .

STATEMENT

1. Nature of the Case

The amended complaint in this suit was filed in November 1982 by respondents José Siderman ("husband"), his wife Lea and their son Carlos (Argentine nationals residing in California at the time of suit), and by their daughter Susana Siderman de Blake, a naturalized United States citizen residing in Florida (collectively "the Sidermans").

The amended complaint named as defendants the Republic of Argentina ("Argentina"); the Province of Tucumán ("Tucumán"), a constituent province and a political subdivision of Argentina; eight Argentine nationals claimed to have been members of the military Government of the Province of Tucumán; and an Argentine construction and real estate management company, "INOSA," owned by the Sidermans. The company owned the "Hotel Gran Corona" in the city of San Miguel de Tucumán.

The Sidermans invoked the district court's jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §1330; the Alien Tort Statute, 28 U.S.C. §1350; diversity jurisdiction, 28 U.S.C. §1332; federal question jurisdiction, 28 U.S.C. §1331; and pendent jurisdiction. Service on Argentina and on Tucumán was made by mail on the Argentine Ministry of Foreign Affairs and on the Governor of Tucumán, respectively; the individual defendants and the INOSA company were not served.

The complaint asserted eighteen claims for relief: claims by the Sidermans for an uncompensated taking of real estate and a wrongful "judicial intervention" of the INOSA company instigated by military authorities who governed Tucumán following the coup d'état in Argentina in 1976; a claim by the husband for a week-long wrongful detention in Tucumán following the coup, during which period he claims to have been mistreated and tortured by masked, machine-gun carrying soldiers; a claim by the husband for false arrest in Italy as a result of a vexatious, and ultimately unsuccessful, extradition request made by Argentina in 1981; a claim by the wife for loss of consortium and emotional distress; derivative claims by the wife, son and daughter for the husband's torture; derivative claims by the Sidermans on behalf of INOSA for conversion, constructive fraud, intentional interference with business relationships and breach of fiduciary duty based on the wrongful intervention; and a claim for the enforcement of an Argentine judgment.

The Sidermans sought compensatory and declaratory relief and punitive damages of $100 million each on 15 of the claims asserted. The last claim sought enforcement of a decree issued by a Provincial court in Tucumán that had vacated the intervention against INOSA and ordered the return of the company's properties to the Sidermans.

2. The Proceedings in the District Court

In February 1983, following receipt of the complaint and the statutory notices of suit by Argentina and Tucumán, the Argentine Embassy in Washington presented a diplomatic note to the Department of State asserting sovereign immunity with respect to

all claims asserted by the Sidermans. The Department of State advised the Embassy that under the FSIA, immunity defenses should be raised in court and transmitted copies of the note and of the Department's response to the Clerk of the district court.

In March 1984, following a hearing on the Sidermans' motion to enter a default, the district court dismissed sua sponte on act of state grounds the Sidermans' taking claims (App. 44a-45a). The court, however, found that it was competent under the Alien Tort Statute to hear the husband's claim for a tort in violation of international law and the wife's claim for loss of consortium. Without stating any reasons, the court further ruled that it had personal jurisdiction over Argentina and over Tucumán, but that it lacked personal jurisdiction over the individual defendants and the INOSA company and dismissed the suit as to these defendants. The court did not examine its competence under the FSIA to hear the claims asserted against Argentina and Tucumán.

In September 1984, the district court entered a default judgment against Argentina and Tucumán for some $2.6 million on the husband's claim as compensation for pain and suffering, physical injuries, loss of earnings, medical expenses and moral damages, and for $100,000 in favor of the wife for loss of consortium. The court denied recovery to the son and the daughter. (App. 46a-53a). One month later, the court entered an order sua sponte for reconsideration of the issue of sovereign immunity, and ordered the issue briefed.

In early-January 1985, Argentina and Tucumán sought relief from the default judgment on the ground that the FSIA provided the sole jurisdictional basis

for suits against them in United States courts. They submitted that the claims asserted against them by the Sidermans were not cognizable under the Act and that, in consequence, the default judgment was void. Without taking any position on the legal issues raised in Petitioners' moving papers, the United States filed a suggestion of interest and urged the court to consider Argentina's motion.

On March 7, 1984, the district court granted the relief sought by the Petitioners, vacated the default judgment, and dismissed the action on the ground that Argentina and Tucumán were immune from the suit under the FSIA, and that the claims asserted by the Sidermans did not fall within any of the exceptions to sovereign immunity under the Act (App. 54a-57a). The Sidermans appealed the district court's dismissal of their taking claim against Argentina and Tucumán and the husband's compensation claim for torture.[2]

3. The Proceedings in the Ninth Circuit

Following the filing of their notice of appeal in April 1985, the Sidermans obtained nine consecutive six-month stays of the appeal. (App. 6a-7a n.5). The Sidermans secured these stays by representing to the Ninth Circuit that the appeal may become moot. In their successive applications for the stays, they informed the court that they had filed an action in the Supreme Court of Argentina under compensatory legislation enacted by the civilian Government of Pres-

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[2] The Sidermans did not appeal the dismissal of the suit against the individual defendants and the INOSA company, or the ruling that the wife, son and daughter lacked standing to claim derivatively damages for the husband's torture. (App. 6a nn. 2, 3).

ident Raúl Alfonsín that had replaced the military regime in late-1984. They further advised the court that their Argentine action "seeks the same relief against the Republic of Argentina as sought by this action," and that if they obtained redress in Argentina their appeal would become moot.[3] The following year they informed the court that the Argentine Supreme Court had sent a letter rogatory to the U.S. District Court in Los Angeles asking that two witnesses be heard.[4] In 1988, they advised the court that the Argentine Supreme Court "agreed to hear plaintiffs' claims for torture and property deprivation;" that "[t]hese are the same claims that are the subject of the instant United States action," and that from May 1986 to February 1988 evidence was taken both in Argentina and in the United States to determine the Respondents' financial condition and their ability to post a substantial bond that was required under Argentine law.[5] Early in 1989, they submitted to the court that the Argentine Supreme Court had issued a decision waiving the bond and that a Provincial court in Tucumán had issued a preliminary decision for the return of some of the Sidermans' properties. "When these properties are returned a major issue will be resolved in plaintiffs' favor in

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[3] Letter from Respondents' counsel to the Clerk of the Court of February 10, 1986; Motion to Stay Briefing Pending Resolution of Action in Argentina, filed March 3, 1986.

[4] Status Report and Motion for Further Stay, filed April 27, 1987.

[5] Status Report and Motion for Further Stay, filed June 9, 1988.

Argentina."[6] Later that year, they submitted that the action in Argentina was "still pending" and that the Sidermans "will also attempt to settle the case through the Argentine Executive Branch.[7] In their last application for a stay of the appeal, the Sidermans advised the court that they had pending a request before the "Advisory Committee of the Argentine Presidency," and that the daughter had requested the Department of State to espouse a diplomatic claim on her behalf.[8]

The Sidermans failed to inform the court of appeals that the compensation claims that they had filed in the Supreme Court of Argentina had been challenged for untimeliness, and that in September 1989, the Supreme Court issued an order dismissing their suit as time-barred.[9]

Argentina and Tucumán opposed any further stays of the appeal and moved for summary affirmance on the authority of this Court's then recent decision in

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[6] Status Report and Motion for Further Stay, filed January 3, 1989.

[7] Status Report and Motion for Further Stay, filed July 18, 1989.

[8] Status Report and Motion for Further Stay, filed August 23, 1990.

[9] The dispositive part of the Order read:

> [T]he suit is dismissed, with costs, on the ground that it is time-barred (Arts. 68 and 69 of the Code of Procedure). Notification to be given to the parties.

Supreme Court of Argentina, No. S525.XX—*Original Jurisdiction*. Siderman, José and others vs. The Argentine Nation and The Province of Tucumán; [complaint] for compensation and damages; Order of September 19, 1989.

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). On October 15, 1990, the court of appeals denied summary affirmance, vacated the last stay, and ordered that the appeal be briefed and argued.

4. The Ninth Circuit's Decision

The court of appeals vacated the district court's judgment dismissing the expropriation claims on the basis of the act of state doctrine and remanded the case for an evidentiary hearing to determine whether the Sidermans' expropriation claims were cognizable under the FSIA's "commercial activity" and "international takings" exceptions to sovereign immunity. (App. 23a). The court noted that "[i]f the district court determines that it does have jurisdiction over the expropriation claims, Argentina can raise, and the district court can reconsider, the act of state doctrine as a defense to those claims." (App. 23a-24a).

The court further ruled that the district court's dismissal of the husband's claim for torture for lack of subject matter jurisdiction under the FSIA constituted reversible error (App. 43a); it remanded the claim to the district court for a determination whether Argentina had impliedly waived its immunity from suit because of "Argentina's invocation of United States judicial authority [as] part and parcel of its efforts to torture and persecute José Siderman." (*Ibid.*).

a) The Sidermans' expropriation claims

The court criticized the district court for dismissing the Sidermans' expropriation claims under the act of state doctrine without considering at the outset its subject matter jurisdiction under the FSIA. (App. 9a-

12a). It then proceeded to examine whether the expropriation claims were cognizable under any of the three "commercial activity" exceptions in §1605(a)(2).[10]

The court began its analysis by acknowledging that to come within the first clause of the FSIA's commercial activity exception, a claim against a foreign state must be "based upon a commercial activity carried on in the United States by the foreign state." (App. 14a). In the court's view, Argentina's continuing management of INOSA, its operation of the Gran Corona Hotel in Tucumán and its receipts of profits from the INOSA company were activities "of a kind in which a private party might engage" (*ibid.*), and were clearly commercial in nature. The court further noted that the seizure of INOSA through a "judicial intervention" may also constitute a commercial activity. (App. 15a n. 10). Turning to the statutory requirement that the foreign states's commercial activities be "carried on in the United States," the court concluded that the requirement was satisfied by the complaint's allegations that the Argentine national airline, Aerolineas Argentinas, advertised the Gran Corona Hotel in the United States and that "numerous Americans have stayed at the Hotel, which accepts all major American credit cards." (App. 16a). In the court's view, these allegations were sufficient to demonstrate that the commercial activities Argentina was conducting through INOSA have "substantial contact with the United States" (*ibid.*), and that the expropriation claim therefore fell squarely within clause one of the commercial activity exception.

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[10] For ease of reference, this petition will refer only to the section numbers of the Act, as codified in 28 U.S.C.

As to the second clause of §1605(a)(2)—which denies immunity if a claim is based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"—the court held that since Americans spend money at the Gran Corona Hotel "which the Sidermans claim rightfully belongs to them" (App. 17a), the "Sidermans' causes of action for conversion, constructive fraud, intentional interference with business relationships and breach of fiduciary duty [in Argentina] directly relate, therefore, to Argentina's acts in this country." (*Ibid.*). Thus, the Sidermans' pleadings also satisfied clause two of the commercial activity exception.

Noting that the Sidermans did not rely on the third clause of §1605(a)(2)—which denies immunity to a foreign state if the claim is based on a commercial act outside the United States and causes a "direct effect" in this country—the court speculated that if the Sidermans could show that dividends from INOSA should have been, but were not, paid to them in the United States, the "direct effect" requirement of the third clause would also be satisfied. (App. 19a). The court instructed the district court that "on remand the Sidermans also may pursue jurisdiction under clause three and seek to cure any jurisdictional defects by amending their complaint and submitting additional evidence." (*Ibid.*).

The court then turned to Petitioners' arguments that subject matter jurisdiction over the Sidermans' expropriation claims could only be predicated on the specific international takings exception to sovereign immunity codified in § 1605(a)(3). Petitioners urged that those Respondents who were Argentine citizens could not assert a taking claim in violation of inter-

national law against their own sovereign, and that in any event the Sidermans' complaint failed to show on its face that their claims were cognizable under § 1605(a)(3) because none of the property allegedly seized in Argentina (or property exchanged for such property), was claimed to be physically present in the United States.

The court accepted the first proposition and rejected the latter. (App. 19a-20a). It ruled that the daughter, an American citizen, was not barred from asserting a claim under §1605(a)(3) for a taking in violation of international law. (App. 20a). The fact that none of the expropriated properties were "present in the United States in connection with a commercial activity carried on in the United States" by Argentina or Tucumán (first clause of §1605(a)(3)), was not dispositive of the jurisdictional issue tendered. The court pointed to the second clause of the international takings exception—which permits a court to hear a suit where the expropriated property "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States"—and held that the daughter could assert subject matter jurisdiction under that clause. The court reasoned (1) that the daughter's claim "that Argentina violated the international law of expropriation is substantial and non-frivolous, because the complaint alleges that Argentine officials seized INOSA for their personal profit and not for any public purpose . . . and because the Siderman family is Jewish" (App. 21a); (2) when INOSA was subjected to judicial intervention in Tucumán, it became an "agency or instrumentality" of Argentina or Tucu-

mán, as defined in §1603(b) (App. 22a); and (3) the daughter also satisfied the second clause's final requirement—that the agency or instrumentality be engaged in a commercial activity in the United States. In the court's view, "[t]he Sidermans' allegations concerning Argentina's solicitation and entertainment of American guests and Hotel Gran Corona and the hotel's acceptance of American credit cards and traveler's checks are sufficient at this stage of the proceedings to show that Argentina is engaged in a commercial activity in the United States." (App. 22a-23a). In consequence, the complaint "brings [the daughter's] expropriation claims within clause two of the international takings exception." (App. 23a).

b) José Siderman's torture claim

The court began its analysis of this claim by observing that, in its view, the decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), merely limited the non-commercial tort exception of the FSIA, §1605(a)(5), "to cases in which the damage to or loss of property occurred within the territorial jurisdiction of the United States." (App. 26a). Had the Sidermans relied solely on that exception, "their claims clearly would be barred under *Amerada Hess*." (*Ibid.*). The court emphasized, however, that the Sidermans' jurisdictional argument was not based on the tort claims exception (App. 38a n. 17), but rather on the "international law principle of *jus cogens*, and the FSIA's existing treaty (section 1604) and implied waiver (section 1605(a)(1)) exceptions" (App. 26a), which the *Amerada Hess* Court did not address.

Following a lengthy exegesis on the doctrine of *jus cogens* (App. 26a-34a), the court concluded that state-

sponsored torture is now universally outlawed and constitutes a violation of *jus cogens*. (App. 33a). Recognizing that it did not "write on a clean slate" (App. 34a), the court lamented that in this case it was bound by an affirmative Act of Congress, and that its task was to interpret the Act "through the prism of *Amerada Hess*." (App. 35a). The court acknowledged that the *Amerada Hess* Court was "so emphatic in its pronouncement that 'immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions'," that it was forced to conclude "that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so." (App. 35a).

Based on *Amerada Hess*, the court also rejected the Sidermans' contention that Argentina should be denied sovereign immunity for torture claims under the 1948 Universal Declaration of Human Rights and the United Nations Charter (App. 35a-38a), since neither of these documents contained any provision "regarding remedies or compensation for violations of its substantive rules of conduct." (App. 37a). It therefore concluded that "[t]he existing treaty exception of section 1604 does not apply to torture claims." (App. 38a).

The court, however, found in the waiver provision of §1605(a)(1) a potential basis for the assertion of jurisdiction over the torture claim. The record established that in 1980—some four years after Mr. Siderman had left Argentina for the United States—the Presiding Judge of the Supreme Court of the Province of Tucumán addressed a letter rogatory to the Superior Court in Los Angeles and requested that a

document relating to a criminal proceeding against José Siderman in Tucumán be delivered to Mr. Siderman. A judge of the Superior Court mailed the notice to Mr. Siderman.[11]

In the court's view, this judicial assistance request presented "a situation where Argentina apparently not only envisioned United States court participation in its persecution of the Sidermans, but by its actions deliberately implicated our courts in the persecution." (App. 41a).

The court found that the presentation of the letter rogatory, sufficed "to bring the [Sidermans'] claims for torture within . . . [the waiver provision] of the FSIA." (App. 39a). Without citing any authority, the court reasoned that "[i]f Argentina has engaged our courts in the very course of activity for which the Sidermans seek redress, it has waived its immunity as to that redress."[12] (App. 42). The court instructed the district court to determine on remand whether the requisite direct connection exists between Mr. Siderman's torture in 1976 and the 1980 Argentine letter rogatory. "If it does, Argentina will be subject to the court's jurisdiction for the torture claims." (App. 43a).

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[11] The Superior Court's letter to Mr. Siderman is reproduced in Appendix E.

[12] The Sidermans argued below that Argentina and Tucumán should be deemed to have waived their sovereign immunity pursuant to §1607 of the FSIA. That section codifies the principle established in *National City Bank v. Republic of China*, 348 U.S. 359 (1955), that when a foreign state brings an action or intervenes in an action in a federal or state court, it becomes subject to counterclaims and setoffs.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT HAS ERRONEOUSLY CONSTRUED AND APPLIED AN IMPORTANT ACT OF CONGRESS GOVERNING THE IMMUNITY OF FOREIGN STATES FROM SUITS FOR THE TAKING OF PROPERTY, AND ITS CONSTRUCTION OF THE ACT'S COMMERCIAL ACTIVITY EXCEPTION TO SOVEREIGN IMMUNITY CONFLICTS WITH OTHER CIRCUITS; THIS COURT HAS ALREADY GRANTED CERTIORARI IN ANOTHER CASE TO REVIEW THE CONFLICT.

The court of appeals' decision in this case marks the first time that any United States court has asserted jurisdiction over a foreign state under the FSIA for compensation for a taking of property under the "commercial activity" exception of the FSIA. The court's decision is demonstrably wrong. The competence of courts to hear taking suits is to be found in the "international takings exception" to sovereign immunity, codified in subparagraph (3) of §1605(a), not in the "commercial activity" exceptions in subparagraph (2) of that section.

The international takings exception is a specific, self-contained exception to the general immunity of foreign states, and empowers courts to hear claims for the taking of property in violation of international law. To begin with, §1605(a)(3) differentiates between taking claims asserted against a foreign state itself (first clause), and taking claims asserted against agencies and instrumentalities of foreign states (second clause). For a taking claim to succeed under the first clause, the claimant must show that the property was taken in violation of international law, that the property (or property exchanged for such property) is present in the United States, and that the property's

presence here is in connection with a commercial activity carried on in the United States by the foreign state, a political subdivision or an agency or instrumentality of the foreign state. H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. at 19 (1976).

The Sidermans' complaint asserted that the property taken from them by the military authorities in Tucumán consisted of real estate and of a hotel owned by INOSA, an Argentine company owned by the Sidermans. Since they did not claim that any of the taken property, or any property exchanged for such property, was brought by Argentina or Tucumán to the United States, their taking claim plainly does not fall within the jurisdictional provision of the first clause of §1605(a)(3).

The court of appeals' conclusion that the district court was competent to hear the taking claim under the second clause of §1605(a)(3) does not bear analysis. Under the second clause, the expropriated property (or any property exchanged for such property) (1) must be owned or operated by an "agency or instrumentality" of a foreign state, and (2) that agency or instrumentality must be engaged in a "commercial activity in the United States."[13] The legislative history explains that the jurisdictional regime of the first clause differs from that of the second clause in that under the latter "the property need not be present in connection with a commercial activity of the agency or instrumentality." *Ibid.* The court of appeals misconstrued the distinction between these

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[13] The terms "commercial activity" and "commercial activity carried on in the United States by a foreign state" are defined in §1603(d) and (e) of the FSIA.

two clauses and, in effect, ruled that under the second clause the property need not be present in the United States at all. The only plausible interpretation of the legislative history just quoted is that where an agency or instrumentality of a foreign state owns or holds the property, the property need not be present *in the United States* in connection with a commercial activity of that agency.

The premises of the court's syllogism, *viz.*, that INOSA qualified as an "agency and instrumentality" of Argentina or of Tucumán because of the judicial intervention (App. 22a); that INOSA engaged in commercial activities in the United States because of Argentina's alleged "solicitation and entertainment of American guests at the Hotel Gran Corona and the hotel's acceptance of American credit cards and traveler's checks" (*ibid.*); and that "[t]he Sidermans' allegations bring Susana Siderman de Blake's expropriation claims within clause two of the international takings exception" (App. 23a) are invalid. The daughter's taking claim is not cognizable under §1605(a)(3).

The court of appeals' principal jurisdictional ruling regarding the taking claim, *i.e.*, that the district court had subject matter jurisdiction over Respondents' expropriation claims under the three clauses of the "commercial activity" exception of §1605(a)(2), is unprecedented and clearly erroneous. The core of the Sidermans' taking claim was that their real estate was unlawfully seized by the military authorities in Tucumán, not that Argentina breached a contract or other commercial undertaking, or committed a commercial tort. Leaving aside the court's assumption that the taking of property by a state within its ter-

ritory can be considered a "commercial activity," the Respondents' claims are not "based upon" the activities carried on by Argentina and Tucumán in the United States—or more accurately, the claims are not "based upon" the activities of INOSA or the Hotel Gran Corona—as mandated by the first clause of §1605(a)(2) of the FSIA. The mere fact that a foreign state or one of its agencies engages in commercial activities in the United States does not satisfy the first clause of the FSIA's commercial activity exceptions. The plain and unambiguous language of the first clause mandates that the suit against the foreign state be "based upon" that activity. Here, the court of appeals identified Argentina's or Tucumán's relevant commercial activity as the Hotel Gran Corona's solicitation of American guests and its acceptance of American credit cards. Plainly, these are not the commercial activities on which the Sidermans' *taking* claims are based. The fact that a foreign state or one of its agencies engages in commercial operations in the United States is itself inadequate to support a finding of subject matter jurisdiction under the FSIA. There must be a close connection between the cause of action asserted and the jurisdictional facts upon which it is based. Other contacts between a defendant foreign state and the forum state, unrelated to a particular cause of action, but that might justify assertion of jurisdiction under the theories of "doing business," or even of "transacting business," do not satisfy the requirements of the commercial activity exception of the FSIA.

The Circuits, however, have differed widely on the proper interpretation of the "based upon" language in §1605(a). *Cf.*, *e.g.*, *Stena Rederi AB v. Comision de*

Contratos, 923 F.2d 380 (5th Cir. 1991) (to satisfy commercial activity exception of FSIA, commercial activity that provides jurisdictional nexus must also be activity on which lawsuit is based) *with Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991) (commercial activity exception of FSIA permits assertion of claim for torture allegedly committed by officials in Saudi Arabia because Saudi government entered into employment contract with claimant in this country). To resolve the conflict among the Circuits, this Court granted certiorari last Term in the *Nelson case* (*Saudi Arabia v. Nelson*, No. 91-522), and the matter is presently being briefed. The Court should therefore also grant certiorari in the instant case, since it presents yet another variant of the Circuit Courts' confusing and inconsistent interpretations and applications of §1605(a)(2)'s "based upon" standard.

The Sidermans also cannot bring their expropriation claims within the second or third clauses of the commercial activity exception codified in §1605(a)(2) because the claims are not based "upon an act performed in the United States in connection with a commercial activity of . . . [Argentina] elsewhere" (second clause), nor are they based "upon an act outside the territory of the United States in connection with a commercial activity of . . . [Argentina] elsewhere, and that act causes a direct effect in the United States" (third clause). By their own pleadings, the Respondents' expropriation claims are not "based upon" a commercial activity of Argentina or Tucumán, but upon a quintessentially sovereign or governmental act—whether denominated seizure, taking, expropriation, confiscation, nationalization or judicial intervention. The court of appeals, therefore, miscon-

strued the import and meaning of the commercial activity exception of the FSIA—the core of the FSIA's exception to foreign sovereign immunity—and incorrectly decided this important federal question.

II. THE NINTH CIRCUIT'S HOLDING THAT A FOREIGN STATE MAY BE SUED FOR TORTURE WHERE THE TORTIOUS ACT AND THE INJURY OCCURRED ABROAD IS IN DIRECT CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT.

The court of appeals' decision in this case also marks the first time that any United States court has asserted jurisdiction over a foreign state and one of its constituent provinces for an intentional tort (wrongful detention and torture) alleged to have been committed by persons acting under color of law on Argentine soil. Not only has the court disregarded the FSIA's express provision for immunity from damage actions in the United States for extraterritorial torts committed by foreign states, but it also ignored the explicit teaching of this Court only three years ago in *Argentine Republic v. Amerada Hess Shipping Corp., supra.*

Less than a decade ago, in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983), the Court cautioned that in enacting the FSIA Congress did not intend to appoint United States courts to sit as little international courts of claims, open to all who seek to litigate a grievance against a foreign state anywhere in the world. In the instant case, the court of appeals has turned a deaf ear to this Court's directive. A suit as the present simply has no place in the courts of the United States.

The court of appeals' rationale that the *Amerada Hess* Court's holding was inapposite to José Siderman's torture claim because here Argentina impliedly waived its immunity from suit is bizarre: according to the court the waiver occurred in 1980—some two years before the instant suit was filed—when a provincial court in Tucumán requested that a document relating to a criminal action against Mr. Siderman be served on him in Los Angeles. According to the court of appeals, the State of Argentina thereby deliberately involved United States courts "in its efforts to torture and persecute" Mr. Siderman. (Mr. Siderman had left Argentina and became a resident of the United States in 1976.) The sanction which the court felt appropriate for such brazenness was to deny to the State of Argentina the immunity from suit which Congress and this Court have said Argentina enjoys.

The FSIA is a carefully crafted federal statute, regulating the jurisdiction of all courts in the United States in a sensitive area and it is designed to keep the courts out of the conduct of the foreign relations of the United States. Through a strict interpretation of this jurisdictional statute, *Argentine Republic v. Amerada Hess, supra*, 488 U.S. at 439-41, application of the act of state doctrine, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428-32 (1964), *W. S. Kirkpatrick v. Environmental Tectonics Corp.*, 493 U.S. ___, 110 S.Ct. 701, 707 (1990) and treaty interpretation, *Zschernig v. Miller*, 389 U.S. 429, 437-41 (1968), this Court has time and again instructed federal and state courts to desist from sitting in judgment on acts performed by foreign states in their own territories, from examining the "democracy quo-

tient" of foreign governments, and from exporting United States law into the territories of foreign states.

The present case is a regrettable example of a federal appellate court's unwillingness to heed the teachings of this Court and to assume the role of a surrogate for the President and the Secretary of State in the conduct of the United States' foreign relations. It should be jurisdictionally irrelevant that the suit here seeks to subject to the jurisdiction of American courts acts of a former military regime in Argentina that was criticized and condemned by the community of nations for its misdeeds. The Government of Argentina respectfully submits that it is not a proper role for American courts to review these acts and to attempt to grant redress to victims of the regime's excesses. The court of appeals' jurisdictional rulings in the instant case do not appear to have been motivated by purely legal considerations, but rather—as the opinion repeatedly manifests—by the court's revulsion at what it termed "a horrifying portrait of anti-Semitic, government-sponsored tyranny" painted in the Sidermans' pleadings.

The court of appeals was informed by the Respondents that the democratically elected government of Argentina that succeeded the military regime in 1983 had, immediately after it assumed the reins of government, provided domestic redress for human rights violations and property losses suffered by its citizens at the hands of its predecessor regime. The court was also advised by the Respondents that they had availed themselves of the redress that had been made available to them under the laws of Argentina and in the Supreme Court of Argentina. Disregarding the comity due to the Supreme Court of Argentina,

the court merely adjourned this appeal for almost five years to await the outcome of Respondents' claims in Argentina. When informed that the Respondents' principal suit in Argentina was dismissed by the Supreme Court for untimeliness, and that the Respondents' claims for the return of property had been successful only in part, the court proceeded to hear the Sidermans' appeal. The court's erroneous jurisdictional rulings, and its instructions to the district court on remand would, in essence, require comprehensive discovery under the guise of jurisdictional discovery. The court's actions are plainly at odds with Congress' intent in enacting the FSIA and with established doctrine that sovereign immunity is an immunity from suit rather than a defense on the merits, and that sovereign immunity is effectively lost if overbroad discovery is ordered or if a case is erroneously permitted to go to trial.

The Court should grant the instant petition for certiorari and review both the substance of the court of appeals' immunity ruling with respect to the extraterritorial tort asserted by the Respondents and the process employed by the court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

BRUNO A. RISTAU
Counsel for the Petitioners

August 20, 1992.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUSANA SIDERMAN DE BLAKE, JOSE SIDERMAN, CARLOS SIDERMAN, AND LEA SIDERMAN, Individuals,
Plaintiffs-Appellants,

v.

THE REPUBLIC OF ARGENTINA, a foreign country; THE PROVINCE OF TUCUMAN OF THE REPUBLIC OF ARGENTINA, a province of a foreign country; OSCAR HONORATO, ABELARDO GARCIA, CARLOS ROSALES, JUAN ROMAN DIOSQUE, VICTOR EDUARDO MOLINA, GENERAL BUSSI, CAPTAIN ABAS, GENERAL FORZANO, GENERAL MERLO, individuals; AND INMOBILIARIA DEL NOR-OESTE, S.A., an Argentine Corporation,
Defendants-Appellees.

No. 85-5773
D.C. No.
CV-82-1772-RMT
OPINION

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted
June 3, 1991—Pasadena, California

Filed May 22, 1992

Before: Betty B. Fletcher, William C. Canby, Jr. and
Robert Boochever, Circuit Judges.

COUNSEL

Michael J. Bazyler, Whittier College School of Law, Los Angeles, California, for the plaintiffs-appellants.

Bruno A. Ristau, Kaplan, Russin & Vecchi, Washington, D.C., for the defendants-appellees.

Betsy R. Rosenthal, Los Angeles, California, for amicus Anti-Defamation League of B'Nai B'Rith.

OPINION

FLETCHER, Circuit Judge:

Susana Siderman de Blake and Jose, Lea, and Carlos Siderman (collectively, "the Sidermans") appeal the dismissal of their action against the Republic of Argentina and the Argentine Province of Tucuman (collectively, "Argentina"). The Sidermans' complaint alleged eighteen causes of action arising out of the torture of Jose Siderman and the expropriation of the Sidermans' property by Argentine military officials. The district court dismissed the expropriation claims on the basis of the act of state doctrine, but granted a default judgment to Jose and Lea Siderman on the torture claims. Argentina then entered its first appearance in the case and moved for relief from judgment on the ground that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, rendered it immune from the Sidermans' action. The district court granted the motion and vacated the default judgment. The Sidermans now appeal. We reverse and remand for further proceedings.

FACTS

The factual record, which consists only of the Sidermans'

complaint and numerous declarations they submitted in support of their claims, tells a horrifying tale of the violent and brutal excesses of an anti-Semitic military junta that ruled Argentina. On March 24, 1976, the Argentine military overthrew the government of President Maria Estela Peron and seized the reins of power for itself, installing military leaders of the central government and the provincial governments of Argentina.[1] That night, ten masked men carrying machine guns forcibly entered the home of Jose and Lea Siderman, husband and wife, in Tucuman Province, Argentina. The men, who were acting under the direction of the military governor of Tucuman, ransacked the home and locked Lea in the bathroom. They then blindfolded and shackled 65-year old Jose, dragged him out of his home, tossed him into a waiting car, and drove off to an unknown building. For seven days the men beat and tortured Jose. Among their tools of torture was an electric cattle prod, which they used to shock Jose until he fainted. As they tortured him, the men repeatedly shouted anti-Semitic epithets, calling him a "Jew Bastard" and a "Shitty Jew." They inflicted all of these cruelties upon Jose Siderman because of his Jewish faith.

At the end of this nightmarish week, his body badly bruised and his ribs broken, Jose was taken out of the building and driven to an isolated area, where the masked men tossed him out of the car. The men told Jose that if he and his family did not leave Tucuman and Argentina immediately, they would be killed. On the day of Jose's release, he and Lea fled to Buenos Aires in fear for their lives. Their son Carlos followed shortly thereafter, and the night Carlos left Tucuman, military authorities ransacked his home. In June 1976, Jose, Lea, and Carlos left Argentina for the United States, where they joined Susana Siderman de Blake. She is the daughter of Jose and Lea and is a United States citizen.

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[1]A general description of the military coup and its aftermath can be found in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1536 (N.D. Cal. 1987).

Before the hasty flight from Tucuman to Buenos Aires, Jose was forced to raise cash by selling at a steep discount part of his interest in 127,000 acres of land. Prior to their departure for the United States, the Sidermans also made arrangements for someone to oversee their family business, Inmobiliaria del Nor-Oeste, S.A. ("INOSA"), an Argentine corporation. Susana Siderman de Blake, Carlos Siderman and Lea Siderman each owned 33% of INOSA and Jose owned the remaining one percent. Its assets comprised numerous real estate holdings including a large hotel in Tucuman, the Hotel Gran Corona. The Sidermans granted management powers over INOSA to a certified public accountant in Argentina.

After the Sidermans left Argentina for the United States, Argentine military officers renewed their persecution of Jose. They altered real property records in Tucuman to show that he had owned not 127,000, but 127, acres of land in the province. They then initiated a criminal action against him in Argentina, claiming that since he owned only 127 acres he had sold land that did not belong to him. Argentina sought the assistance of our courts in obtaining jurisdiction over his person, requesting via a letter rogatory that the Los Angeles Superior Court serve him with documents relating to the action. The court, unaware of Argentina's motives, complied with the request.

Soon thereafter, while he was travelling in Italy, Jose was arrested pursuant to an extradition request from Argentina to the Italian government. Argentina charged that Jose had fraudulently obtained the travel documents enabling him to leave Argentina in 1976. Jose was not permitted to leave Cremora, Italy, for seven months, and actually was imprisoned for 27 days, before an Italian Appeals Court finally held that Argentina's extradition request would not be honored, as it was politically motivated and founded on pretextual charges.

The Argentine military also pursued INOSA with vigor. In April 1977, INOSA was seized through a sham "judicial

intervention," a proceeding in which property is put into receivership. The purported reasons for the intervention were that INOSA lacked a representative in Argentina and that INOSA had obtained excessive funds from a Tucuman provincial bank. Though these reasons were pretexts for persecuting the Sidermans because of their religion and profiting from their economic success, the Sidermans were unable to oppose the intervention because Argentine officials had imprisoned and killed the accountant to whom they had granted management powers over INOSA. In 1978, the Sidermans retained an attorney in Argentina and brought a derivative action in a Tucuman court in an effort to end the intervention. The court ordered that the intervention cease, and the order was upheld by the Supreme Court of Tucuman, but the order remains unenforced and the intervention has continued. Argentine military officials and INOSA's appointed receivers have extracted funds from INOSA, purchased various assets owned by INOSA at sharply discounted prices, and diverted INOSA's profits and revenues to themselves.

In 1982, Jose, Lea, and Carlos, who by then had become permanent residents of the United States, and Susana, a United States citizen since 1967, turned to federal court for relief. They filed a complaint asserting eighteen causes of action based on the torture and harassment of Jose by Argentine officials and the expropriation of their property in Argentina. Named defendants included the Republic of Argentina, the Province of Tucuman, INOSA, and numerous individual defendants who participated in the wrongdoing. In December 1982, the Sidermans properly served Argentina and Tucuman with the Summons and Complaint. The Argentine Embassy subsequently sought assistance from the U.S. State Department, which informed Argentina that it would have to appear and present any defenses it wished to assert to the district court, including the defense of sovereign immunity, or risk a default judgment. The State Department also provided a directory of lawyer referral services. Despite receiving this

information, Argentina did not enter an appearance, and the Sidermans filed a motion for default judgment.

On March 12, 1984, the district court dismissed the Sidermans' expropriation claims *sua sponte* on the basis of the act of state doctrine and ordered a hearing for the Sidermans to prove up their damages on the torture claims.[2] The Sidermans moved for reconsideration of the court's dismissal of the expropriation claims. On September 28, 1984, the court denied the motion for reconsideration and entered a default judgment on the torture claims, awarding Jose damages and expenses totalling $2.6 million for his torture claims and awarding Lea $100,000 for her loss of consortium claim.[3]

The damages award finally elicited a response from Argentina, which filed a motion for relief from judgment on the ground that it was immune from suit under the FSIA and that the district court therefore lacked both subject matter and personal jurisdiction. The United States filed a suggestion of interest, asking the court to consider the issue of foreign sovereign immunity but indicating no view of the merits. On March 7, 1985, the district court vacated the default judgment and dismissed the Sidermans' action on the ground of Argentina's immunity under the FSIA.[4] The Sidermans filed a timely notice of appeal on April 5, 1985.[5] We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

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[2]The district court also dismissed the claims against the individual defendants for lack of personal jurisdiction because they were never served. The Sidermans are not challenging this ruling on appeal.

[3]Lea, Carlos, and Susana were found to lack standing to claim damages for Jose's torture, and they do not appeal this ruling of the district court.

[4]The court did not reach the question of personal jurisdiction, nor do the parties argue the issue on appeal. The FSIA provides that personal jurisdiction exists if subject matter jurisdiction exists and proper service has been made under the FSIA. *See* 28 U.S.C. § 1330(b). Nevertheless, the exercise of personal jurisdiction also must comport with the constitutional requirement of due process. *See Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 648-51 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984).

[5]Since filing the notice, the Sidermans have sought and obtained nine six-month stays of the appeal while they pursued an ultimately unsuccess-

DISCUSSION

Until 1952, foreign states and their agencies and instrumentalities enjoyed virtually absolute immunity from suit in the courts of the United States. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Chief Justice John Marshall authored the seminal opinion that considered and recognized the immunity of a foreign state from suit in a United States court. In *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), the Court upheld a French plea of immunity against an American citizen's assertion of title to an armed national vessel of France that had entered the territorial waters of the United States. In his opinion for the Court, Chief Justice Marshall first emphasized the "exclusive and absolute" nature of a nation's territorial jurisdiction, any exception to which could arise only from the consent or waiver of that nation. 11 U.S. (7 Cranch) at 136. He then explained:

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, . . . all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

Id. Thus, Chief Justice Marshall announced that the common practice of nations forms the foundation for the doctrine of foreign sovereign immunity, while a given state's agreement to grant immunity in a particular case is a matter of grace, comity, and respect for the equality and independence of other sovereigns. *See Verlinden*, 461 U.S. at 486. Although *The Schooner Exchange* did not announce a rule of absolute sov-

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ful suit in Argentina that could have mooted the present case. On October 15, 1990, in light of Argentina's opposition to the ninth stay, the stay was vacated and the briefing schedule set.

ereign immunity, in the following 140 years absolute immunity became the norm, principally because the courts practiced consistent deference to the Executive Branch, which "ordinarily requested immunity in all actions against friendly foreign sovereigns." *Id.*

In 1952, however, the Acting Legal Adviser of the State Department, Jack Tate, sent a letter to the Acting Attorney General announcing that the State Department was adopting the "restrictive" principle of foreign sovereign immunity. *Id.* at 487 & n.9. Under the restrictive principle, as defined in the Tate Letter, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." 26 Dep't of State Bull. 984 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2). With the issuance of the Tate Letter, the United States joined the emerging international consensus that private acts of a sovereign — commercial activities being the primary example — were not entitled to immunity. While the Tate Letter altered the Executive Branch's view of foreign sovereign immunity, it did not provide the courts with concrete legislative standards for determining whether to assert jurisdiction over actions against foreign states. Thus, the courts continued to defer to the Executive Branch. When the State Department issued a suggestion of immunity in a particular case, the court followed it; when the State Department remained silent, the court relied on prior suggestions for precedential assistance in determining immunity. *Verlinden*, 461 U.S. at 487.

With the enactment of the FSIA in 1976, Congress replaced the regime of deference to Executive suggestion with a comprehensive legislative framework "governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Id.* at 488; H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6606 ("A

principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch . . . .''). In essence, the FSIA codified the restrictive theory of sovereign immunity, which had become widely accepted in international law. *See Verlinden*, 461 U.S. at 487-88; H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14, 1976 U.S. Code Cong. & Admin. News at 6613 (referring to international law and Tate Letter). Structurally, the FSIA sets forth the general rule that foreign states are immune from the jurisdiction of both federal and state courts in the United States, subject to certain exceptions. 28 U.S.C. §§ 1330(a) & 1604. A federal court lacks subject matter jurisdiction over a claim against a foreign state unless the claim falls within an exception to immunity under the FSIA. *See* 28 U.S.C. § 1330(a); *Verlinden*, 461 U.S. at 489; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (FSIA is "sole basis for obtaining jurisdiction over a foreign state in federal court").

As a threshold matter, therefore, a court adjudicating a claim against a foreign state must determine whether the FSIA provides subject matter jurisdiction over the claim. *Liu v. Republic of China*, 892 F.2d 1419, 1424 (9th Cir. 1989), *cert. dismissed*, 111 S. Ct. 27 (1990). The existence of subject matter jurisdiction under the FSIA is a question of law subject to de novo review. *Id.* Where, as in the present case, a claim has been dismissed for lack of jurisdiction, we accept the allegations of the complaint as true. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1513 (9th Cir. 1987).

The parties and the district court have agreed that the Sidermans' claims fall into two categories: those relating to the expropriation of INOSA and those relating to the torture of Jose Siderman. The district court initially dismissed the expropriation claims on the basis of the act of state doctrine, while awarding a default judgment to the Sidermans on the torture claims. Only later did the court dismiss the torture claims and the Sidermans' entire action. Because the two cat-

egories of claims were dismissed at different stages of the suit, and for different reasons, we separately address each category.

I. EXPROPRIATION CLAIMS

In its order of March 12, 1984, the district court dismissed the expropriation claims on the basis of the act of state doctrine; it did not consider whether it had subject matter jurisdiction over the claims pursuant to the FSIA.[6] The district court erred in deciding the act of state issue without first considering the threshold issue of its subject matter jurisdiction. Because the federal courts lack jurisdiction over a claim against a foreign state that is immune under the FSIA, "[a]t the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the [FSIA] exceptions applies." *Verlinden*, 461 U.S. at 493-94. The district court must address this issue "even if the foreign state does not enter an appearance to assert an immunity defense." *Id.* at 494 n.20. The court simply cannot proceed without subject matter jurisdiction.

In contrast to the jurisdictional nature of foreign sovereign immunity under the FSIA, "[t]he act of state doctrine is not a jurisdictional limit on courts." *Liu*, 892 F.2d at 1431. The doctrine reflects the prudential concern that the courts, if they question the validity of sovereign acts taken by foreign states,

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[6]Argentina contends that the district court held that it lacked jurisdiction over the expropriation claims when it later granted Argentina's motion for relief from judgment and dismissed the Sidermans' entire action. We find no evidence in the record to support this contention. At the time that Argentina filed its motion, the district court already had dismissed the expropriation claims. Those claims were no longer at issue. Moreover, the parties neither raised nor briefed the applicability of the FSIA to the expropriation claims before the district court, and nothing in the court's order granting Argentina's motion indicates that it considered the issue. The sole basis for the district court's dismissal of the expropriation claims was the act of state doctrine.

may be interfering with the conduct of American foreign policy by the Executive and Congress.[7] *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 404 (1990); *Liu*, 892 F.2d at 1431. The act of state doctrine is a principle or rule of decision that the courts apply in deciding cases within their jurisdiction. *Environmental Tectonics*, 493 U.S. at 406, 409; *see also West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 827 (9th Cir.) (describing act of state doctrine as "combination justiciability and abstention rule"), *cert. denied*, 482 U.S. 906 (1987). In terms of the Federal Rules of Civil Procedure, the act of state doctrine does not bar an action for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), but rather for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). *See Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 602 (9th Cir. 1976). If a court lacks jurisdiction over a case involving a foreign state, the act of state doctrine never comes into play.[8]

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[7]The doctrine derives from *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), in which the Court declined to adjudicate the validity of expropriations by the Cuban government. The precise holding of *Sabbatino* was that:

> the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id. at 428; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 443(1) & Comment b (1987). As the numerous qualifications in *Sabbatino*'s holding indicate, the act of state doctrine is "supple, flexible, ad hoc." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989).

[8]We note that in *International Association of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), a panel of our court applied the act of state doctrine without first resolving the threshold issue of immunity and jurisdiction under the FSIA. However, the *OPEC* decision was rendered prior to the Supreme Court's

"Because sovereign immunity is jurisdictional and the act of state doctrine is not, we must consider sovereign immunity before reaching the act of state doctrine." *De Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985); *see Liu*, 892 F.2d at 1424 (first determining whether subject matter jurisdiction existed under FSIA before addressing district court's act of state ruling).

Since the district court did not consider jurisdiction under the FSIA with regard to the expropriation claims, it made no findings of fact concerning jurisdiction. The record consists of the complaint and numerous declarations submitted by the Sidermans in support of their contention that certain of the FSIA exceptions apply, but includes no pleadings or evidence from Argentina, which had not yet entered an appearance in the case when the expropriation claims were dismissed. Argentina contends that the Sidermans' complaint and declarations fail to demonstrate that the expropriation claims fall within an FSIA exception, and asks us to affirm the district court's dismissal on that ground. We therefore review the record to determine whether the Sidermans have sustained their initial burden of alleging jurisdiction under the FSIA. If the allegations in the Sidermans' complaint, which we must accept as true, and the uncontroverted evidence presented by the Sidermans bring the claims within an FSIA exception, the burden then shifts to Argentina to prove that any relevant exceptions do not apply. "Once the plaintiff offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d

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opinions in both *Verlinden*, which clearly establishes that the question of whether there is jurisdiction under the FSIA must be answered "[a]t the threshold of every action in district court against a foreign state," 461 U.S. at 493-94, and *Environmental Tectonics*, which clarified the nature of the act of state doctrine. We therefore address the jurisdictional issue first.

777, 779 (9th Cir. 1991) (quoting *Joseph v. Office of the Consulate Gen'l of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988)). If the Sidermans successfully have alleged that an exception to immunity under the FSIA applies to their claims, we must remand the claims in order to afford Argentina the opportunity to rebut the Siderman's evidence and sustain its burden of proof before the district court.[9]

The Sidermans argue that two of the FSIA exceptions apply to their expropriation claims, the commercial activity exception, 28 U.S.C. § 1605(a)(2), and the international takings exception, 28 U.S.C. § 1605(a)(3). We consider each in turn.

A. Commercial Activity Exception

The commercial activity exception provides that a foreign state is not immune from jurisdiction where

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[9]Although the Sidermans have submitted declarations and evidence beyond the pleadings, allegations in a complaint can themselves be sufficient to require a response from the foreign state defendant before the complaint can be dismissed. In *Meadows v. Dominican Republic*, 817 F.2d 517, 522-23 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987), we held that, at least with regard to the commercial activity exception to the FSIA, the district court should observe the following procedure:

> Where, as here, the plaintiff alleges in his complaint that his claim is based on a foreign state's strictly commercial acts, the defendant must establish a prima facie case that it is a sovereign state and thattheplaintiff's claim arises out of a public act. This proof establishes a presumption that the foreign state is protected by immunity. The plaintiff then has the burden of going forward with the evidence by offering proof that one of the FSIA exemptions applies. Once the plaintiff has presented this evidence, the defendant must prove its entitlement to immunity by a preponderance of the evidence.

Thus, even if the Sidermans had presented nothing more than the allegations in their complaint, *Meadows* indicates that it would have been incumbent upon Argentina to respond to those allegations.

> the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

28 U.S.C. § 1605(a)(2). As the bracketed numbering indicates, section 1605(a)(2) contains three clauses. *See Schoenberg*, 930 F.2d at 779-80. We find that the Sidermans have presented sufficient allegations and evidence to demonstrate — at least at this stage of the proceedings — that their expropriation claims fall within the first and second clauses and may also fall within the third.

In order to come within the first clause of the exception, a claim against a foreign state must be "based upon a commercial activity carried on in the United States by the foreign state." Commercial activity "means either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). In determining whether an act or activity is commercial, we must look to its nature, not its purpose. 28 U.S.C. § 1603(d); *Schoenberg*, 930 F.2d at 780. Though activities that customarily are carried on for profit are certainly commercial, *Schoenberg*, 930 F.2d at 780, an activity need not be motivated by profit to be commercial, *Joseph*, 830 F.2d at 1024. The central question is "whether the activity is of a kind in which a private party might engage." *Id.* In light of the allegations and evidence submitted by the Sidermans, we have no doubt that the Sidermans' claims are based on commercial activity being conducted by Argentina. The activities that form the basis for the claims — Argentina's continuing management of INOSA, its operation of the Hotel Gran Corona, and its receipt of profits from the company's

operations — are clearly activities "of a kind in which a private party might engage."[10]

The more difficult question is whether this commercial activity is being "carried on in the United States." 28 U.S.C. § 1605(a)(2). As defined by the FSIA, " 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). Under this definition, the forum state need not engage in commercial activity in the United States on a regular basis. *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991). Instead, the critical inquiry is whether there is "a nexus between the defendant's commercial activity in the United States and the plaintiff's grievance." *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989).

The Sidermans have alleged and put forward evidence that Argentina advertises the Hotel Gran Corona in the United States and solicits American guests through its U.S. agent,

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[10]Argentina's initial seizure of INOSA through a "judicial intervention," which the Sidermans allege to have been nothing more than a sham for expropriation, similarly may constitute commercial activity. In *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114 (S.D.N.Y. 1988), a consortium of banks had entered into a deposit lending agreement with a Venezuelan bank, pursuant to which the consortium deposited $30 million. Venezuela subsequently declared an "intervention" in the bank's affairs on the ground that the bank was either in danger of failing or had violated banking laws. Venezuela granted all management powers to a vice president of Venezuela's Deposit Guaranty and Bank Protection Fund, and eventually the bank was ordered liquidated. In the consortium's subsequent action against Venezuela, the court found that Venezuela's intervention and operation of the bank constituted commercial activity. 700 F. Supp. at 119-20. On the present record, we cannot determine whether a judicial intervention in Argentina is an action that a private party can perform. The Sidermans are free to pursue this argument on remand. We note that the commercial activity exception does not require that *every* act alleged be commercial in nature. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 450 (D.C. Cir. 1990).

Aerolinas Argentinas, the national airline of Argentina. They have alleged further that numerous Americans have stayed at the Hotel, which accepts all the major American credit cards, including Mastercard, Visa, and American Express. On the present record, we believe that these allegations are sufficient to demonstrate that the commercial activities Argentina is conducting through INOSA have "substantial contact with the United States." The Sidermans' allegations also satisfy the nexus requirement established in *America West*. Several of the Sidermans' expropriation claims are directed toward the stream of revenue and benefits that Argentina is receiving through its operation of the Hotel. Argentina's continuing receipt of the profits and benefits that rightfully belong to the Sidermans — including those derived from U.S. sources — are some of the "specific acts that form the basis of the suit." *Id.* at 797 (quoting *Joseph*, 830 F.2d at 1023) (emphasis omitted). We conclude that the Sidermans' allegations and evidence bring their claims within clause one of the commercial activity exception.

Clause two of the exception applies to actions based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). As the few cases to address this clause have noted, it requires a "material connection ... between the plaintiff's cause of action and the *act performed in the United States*." *Stena Rederi AB. v. Comision de Contratos del Comite Ejecutivo General*, 923 F.2d 380, 388 (5th Cir. 1991) (emphasis in original). A plaintiff must either demonstrate a causal connection between a sovereign's actions in the United States and those abroad giving rise to the plaintiff's claims, or the sovereign's acts in the United States must themselves represent an element in the plaintiff's cause of action. *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982); *see also* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S.C.C.A.N. 6613, 6618.

The allegations and evidence set forth by the Sidermans that Argentina solicits guests for the Hotel Gran Corona in the

United States and presumably accepts payments for those reservations in this country, and that as a result numerous Americans stay at the Hotel, suffice to meet this test. Because of Argentina's acts in the United States — the solicitation and acceptance of reservations — Americans spend money at the Hotel Gran Corona, money which the Sidermans claim rightfully belongs to them. The Sidermans' causes of action for conversion, constructive fraud, intentional interference with business relationships and breach of fiduciary duty directly relate, therefore, to Argentina's acts in this country. Argentina undertakes those acts, furthermore, in connection with commercial activity elsewhere, mainly its operation of the Hotel. The Sidermans' claims thus fall squarely within clause two of the commercial activity exception.

For the Sidermans' expropriation claims to satisfy clause three of the exception, the claims must be based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act [must] cause[ ] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The Sidermans base their claims on Argentina's seizure and continuing operation of INOSA, both of which constitute acts that Argentina has performed outside United States territory. It is equally clear that they have been performed in connection with the commercial activities of operating the Hotel Gran Corona and managing INOSA's real estate investments in Argentina. These activities are, as noted above, "of a kind in which a private party might engage." *Joseph*, 830 F.2d at 1024. The dispositive element in clause three for purposes of this case, therefore, is the requirement that the acts cause a direct effect in the United States.

Under the direct effect requirement, the "foreign sovereign's activities must cause an effect in the United States that is substantial and foreseeable in order to abrogate sovereign immunity." *America West*, 877 F.2d at 799. For example, in *America West*, an American airline sued an Irish national airline for damage sustained by an aircraft engine on which the

Irish airline had performed faulty maintenance work. Finding that it was not foreseeable that the maintenance work performed in Ireland on an engine then owned by a Netherlands Antilles company would have an effect in the United States, we held that the direct effect requirement was unsatisfied. *Id.* at 800. The "purely fortuitous" fact that the plaintiff whose plane subsequently was fitted out with the engine was an American corporation was insufficient to create a direct effect. *Id.*; *see also Security Pacific Nat'l Bank v. Derderian*, 872 F.2d 281, 286 (9th Cir. 1989); *Martin v. Republic of S. Africa*, 836 F.2d 91, 94-95 (2d Cir. 1987) (finding no direct effect in United States where African-American was denied medical treatment in South Africa).

As a general matter, therefore, "[m]ere financial loss" suffered by a person, whether individual or corporate, in the United States is not, in itself, sufficient to constitute a "direct effect." *America West*, 877 F.2d at 799-800. However, in cases where a plaintiff's claim is for breach of a contract providing that payment or performance must be made in the United States, the "direct effect" requirement has been deemed satisfied.[11] For example, in *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir. 1987), we considered an action brought by two U.S. residents to recover a loan commission they earned by obtaining a loan on behalf of a foreign

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[11]These cases reflect the general rule that "a direct effect occurs at the locus of the injury directly resulting from the sovereign defendant's wrongful acts." Restatement (Third) of the Foreign Relations Law of the United States § 453 Reporter's Note 5 (1987). Thus, two Ninth Circuit cases cited by Argentina have held that the estate or family of a decedent who died abroad could not establish the required direct effect, because their injuries were only indirectly related to the direct injury suffered by the decedent. *See Australian Gov't Aircraft Factories v. Lynne*, 743 F.2d 672, 674-75 (9th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) (American pilot died when plane crashed in Indonesia); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984) (American killed by revolutionary forces in Iran). These cases are distinguishable from the Sidermans' action, which asserts direct injuries to the Sidermans as the owners and shareholders of INOSA.

government. Under the loan agreement, the commission was to be paid in the United States — through the plaintiffs' bank — and we found this to be a sufficiently direct effect to permit jurisdiction under clause three. 817 F.2d at 523. *See also Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989) (discussing similar cases); *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 121 (S.D.N.Y. 1988) (extending rule to encompass foreign plaintiff).

As an owner and shareholder of INOSA, each of the Sidermans is entitled to a share of the profits earned by the corporation. If INOSA's articles of incorporation or by-laws (or the equivalent corporate documents under Argentine law) require INOSA to pay those dividends at the shareholder's place of residence, the United States, we believe in light of *Meadows* that the direct effect requirement would be satisfied. While the record before us does not reveal whether this is the case, it would be premature to hold that the Sidermans have failed to establish a direct effect. Since the Sidermans have alleged jurisdiction under clauses one and two, and we are remanding the expropriation claims on those grounds, on remand the Sidermans also may pursue jurisdiction under clause three and seek to cure any jurisdictional defects by amending their complaint or submitting additional evidence. *See Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553, 1561-62 (9th Cir. 1987); *In re Complaint of McLinn*, 744 F.2d 677, 685 (9th Cir. 1984).

B. International Takings Exception

The Sidermans argue that their claims also fall within the international takings exception to the FSIA's rule of immunity. That exception provides that a foreign state is not immune in an action

> in which rights in property taken in violation of international law are in issue and [1] that property or any property exchanged for such property is present

> in the United States in connection with a commercial activity carried on in the United States by the foreign state; or [2] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . . .

28 U.S.C. § 1605(a)(3). Though few courts have had the opportunity to consider the international takings exception, it is clear that Jose, Lea, and Carlos Sideman cannot assert a claim that comes within this exception. In *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990), we held that the exception does not apply where the plaintiff is a citizen of the defendant country at the time of the expropriation, because "[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law." *See also De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985). However, Susana Siderman de Blake is eligible to invoke the international takings exception, and the Sidermans' allegations and evidence bring her claims within clause two of that exception.

Under that clause, the property at issue must have been taken in violation of international law. At the jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a "claim is substantial and nonfrivolous, it provides a sufficient basis for the exercise of our jurisdiction." *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987). In *West*, we described three requisites under international law for a valid taking. First, "[v]alid expropriations must always serve a public purpose." 807 F.2d at 831. Second, "aliens [must] not be discriminated against or singled out for regulation by the state." *Id.* at 832. Finally, "[a]n otherwise valid taking is illegal without the payment of just compensation." *Id.* These well-established principles track the Restatement of Foreign Relations Law, which provides:

> A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that
>
> (a) is not for a public purpose, or
>
> (b) is discriminatory, or
>
> (c) is not accompanied by provision for just compensation . . . .

Restatement (Third) of the Foreign Relations Law of the United States § 712 (1987) [hereinafter "Restatement"]. The legislative history of the FSIA reveals a similar understanding of what constitutes a taking in violation of international law. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19-20, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6618 (taking violates international law if it is done "without payment of the prompt adequate and effective compensation required by international law" or is "arbitrary or discriminatory in nature"). If a taking violates any one of the aforementioned proscriptions, it violates international law.

Susana Siderman de Blake's claim that Argentina violated the international law of expropriation is substantial and non-frivolous. The complaint alleges that Argentina officials seized INOSA for their personal profit and not for any public purpose. The complaint also alleges that Argentina seized INOSA because the Siderman family is Jewish — a discriminatory motivation based on ethnicity. *See* Restatement § 712 Comment f (noting that "taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law"). Finally, none of the Sidermans has received *any* compensation for the seizure, let alone just compensation. As in *West*, we have no difficulty concluding that the Sidermans' complaint contains "substantial and

non-frivolous" allegations that INOSA was taken in violation of international law.

Beyond establishing that property has been taken in violation of international law, Susan Siderman de Blake must demonstrate that the expropriated property, or property exchanged for it, is owned or operated by an agency or instrumentality of Argentina and that the agency or instrumentality is engaged in commercial activity in the United States. The Sidermans' allegations establish that INOSA itself has become an agency or instrumentality of Argentina. As defined by the FSIA, an "agency or instrumentality"

> means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, . . . and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603(b). As an Argentine corporation, INOSA satisfies the first and third elements of the above definition, and the Sidermans' basic allegation that Argentina has expropriated INOSA suffices as an allegation that INOSA is now an "organ" of Argentina or Tucuman. The Sidermans' allegations thus satisfy the "agency or instrumentality" definition. The final requirement under clause two — that the agency or instrumentality must be engaged in a commercial activity in the United States — is also met. The Sidermans' allegations concerning Argentina's solicitation and entertainment of American guests at the Hotel Gran Corona and the hotel's acceptance of American credit cards and traveler's checks are sufficient at this stage of the proceedings to show that Argen-

tina is engaged in a commercial activity in the United States. The Sidermans' allegations bring Susana Siderman de Blake's expropriation claims within clause two of the international takings exception.

We hold that the Sidermans' complaint and declarations allege sufficient facts to bring their expropriation claims within both the commercial activity and international takings exceptions to the FSIA's grant of foreign sovereign immunity. We emphasize the preliminary nature of our holding; following further development of the factual record on remand, the district court ultimately must determine whether the FSIA exceptions do or do not apply to the expropriation claims. While the Sidermans have sustained their initial burden of alleging applicable exceptions to the FSIA, Argentina will have the opportunity on remand to challenge the evidence presented by the Sidermans and to present its own. Under the procedures our circuit has developed for considering jurisdiction under the FSIA, Argentina now bears the burden of proving by a preponderance of the evidence that none of the FSIA exceptions applies to the Sidermans' claims. *Schoenberg*, 930 F.2d at 779. To the extent that the jurisdictional facts are disputed on remand, the parties should be allowed to conduct discovery for the limited purpose of establishing jurisdictional facts before the claims can be dismissed. *See America West*, 877 F.2d at 801 ("[W]here pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed."); *see also Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 892 n.2 (7th Cir. 1991); *Filus v. LOT Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990).

Because we are remanding to the district court for a more complete investigation of the jurisdictional basis for the Sidermans' expropriation claims, we vacate the district court's judgment dismissing those claims on the basis of the act of state doctrine. If the district court determines that it does have jurisdiction over the expropriation claims, Argentina can raise, and the district court can reconsider, the act of state

doctrine as a defense to those claims. The district court erred in applying that doctrine before Argentina had even entered an appearance in the case. "The burden of proving acts of state rests on the party asserting the applicability of the doctrine." *Liu*, 892 F.2d at 1432; *see also Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989). "At a minimum, this burden requires that a party offer some evidence that the government acted in its sovereign capacity and some indication of the depth and nature of the government's interest." *Liu*, 892 F.2d at 1432. Because the district court acted *sua sponte* in dismissing the expropriation claims, Argentina has offered no such evidence of an act of state.[12]

II. TORTURE CLAIMS

The question of Argentina's immunity from the Sidermans' torture claims is squarely presented, without the procedural complications surrounding the district court's treatment of the expropriation claims. The district court dismissed the torture claims on the ground that they fell within no exception to immunity under the FSIA.[13] In defending the district court's

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[12]We also note that since the time of the district court's ruling, both the Supreme Court and our circuit have provided more extensive guidance on the factors the district court should consider in deciding whether it is appropriate to apply the act of state doctrine in a given case. *See, e.g., W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990); *Liu*, 892 F.2d at 1431-34; *Marcos*, 862 F.2d at 1360-61.

[13]When the district court granted the initial default judgment in favor of Jose and Lea Sidernan on the torture claims, it relied on the Alien Tort Statute, which provides the federal courts with jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. When the district court later granted Argentina's motion for relief from the default judgment, it held that the Alien Tort Statute did not provide an exception to foreign sovereign immunity and that no exception in the FSIA encompassed the Sidermans' torture claims. The Supreme Court since has held that the Alien Tort Statute does not provide jurisdiction over suits against

decision on appeal, Argentina argues that the Sidermans' claims are foreclosed by the Supreme Court's opinion in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). Since *Amerada Hess* represents the Court's most extensive treatment of the FSIA and its exceptions to immunity, we begin with a discussion of the case before turning to the Sidermans' arguments about why the case does not preclude their torture claims.

Amerada Hess involved a Liberian oil tanker that was attacked by Argentine military aircraft during the Falklands/Malvinas War between Great Britain and Argentina. The tanker's owner and its charterer each brought suit against Argentina, but the district court dismissed their actions for lack of subject matter jurisdiction under the FSIA. The court of appeals reversed, finding that subject matter jurisdiction existed under the Alien Tort Statute. The Supreme Court, reversing the court of appeals, held that the FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in our courts," 488 U.S. at 434, and found that none of the exceptions to the general FSIA rule of immunity encompassed the plaintiffs' claims. *Id.* at 439.

In *Amerada Hess*, the plaintiffs relied primarily on the non-commercial tort exception to the FSIA's grant of immunity. That exception eliminates immunity in cases

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that

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foreign states; the FSIA is the sole basis for jurisdiction over such actions. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-38 (1989). In light of *Amerada Hess*, and because the FSIA links immunity to subject matter jurisdiction, the district court's determination that no FSIA exception applied to the torture claims necessarily constituted a determination that the court lacked subject matter jurisdiction.

> foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . . .

28 U.S.C. § 1605(a)(5). The Court, limiting this exception to cases in which the damage to or loss of property occurred within the territorial jurisdiction of the United States, held that it did not encompass the plaintiffs' claims. 488 U.S. at 439-41. Argentina has devoted the bulk of its argument in the present case to a discussion of the noncommercial tort exception and *Amerada Hess*'s holding that the exception does not encompass tortious activity perpetrated outside the territorial jurisdiction of the United States. If the Sidermans were relying on section 1605(a)(5), their claims clearly would be barred under *Amerada Hess*. However, none of the three arguments they raise rests on that exception. Instead, the Sidermans contend that Argentina is precluded from asserting the defense of sovereign immunity by the international law principle of *jus cogens*, and by the FSIA's existing treaty (section 1604) and implied waiver (section 1605 (a)(1)) exceptions. We consider each of these arguments in turn.

A. Jus Cogens

The Sidermans contend that Argentina does not enjoy sovereign immunity with respect to its violation of the *jus cogens* norm of international law condemning official torture.[14] While we agree with the Sidermans that official acts of torture of the sort they allege Argentina to have committed constitute a *jus cogens* violation, we conclude that *Amerada Hess* forecloses their attempt to posit a basis for jurisdiction not expressly countenanced by the FSIA.

As defined in the Vienna Convention on the Law of Treaties, a *jus cogens* norm, also known as a "peremptory norm"

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[14]The term "official torture" is intended to encompass acts of torture performed by or under the direction of government officials.

of international law, "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679 [hereinafter "Vienna Convention"]; *see also* Restatement § 102 Reporter's Note 6. *Jus cogens* is related to customary international law (the direct descendant of the law of nations), which the Restatement defines as the "general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2). Courts ascertain customary international law "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (Story, J.); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (in ascertaining and administering customary international law, courts should resort "to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators"); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980). Courts seeking to determine whether a norm of customary international law has attained the status of *jus cogens* look to the same sources, but must also determine whether the international community recognizes the norm as one "from which no derogation is permitted." *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988) [hereinafter "*CUSCLIN*"] (quoting Vienna Convention, art. 53). In *CUSCLIN*, the only reported federal decision to give extended treatment to *jus cogens*, the court described *jus cogens* as an elite subset of the norms recognized as customary international law. *Id.*

While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states.

A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm, *see* Restatement § 102 Comment d, just as a state that is not party to an international agreement is not bound by the terms of that agreement. International agreements and customary international law create norms known as *jus dispositivum*, the category of international law that "consists of norms derived from the consent of states" and that is founded "on the self-interest of the participating states." Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 Yale J. Int'l L. 332, 351 (1988) [hereinafter "*Human Rights in Domestic Courts*"]. *Jus dispositivum* binds only "those states consenting to be governed by it." *Id.*

In contrast, *jus cogens* "embraces customary laws considered binding on all nations," *id.* at 350-51, and "is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations," *id.* at 351. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II. *See* Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. Cal. L. Rev. 833, 868 (1990) [herinafter "*Nuremberg Legacy*"]; Belsky, Merva & Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Calif. L. Rev. 365, 385-86 (1989) [hereinafter "*Implied Waiver*"]. The legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal. *See Nuremberg Legacy, supra*, at 862-67. The universal and fundamental rights of human beings identified by Nuremberg — rights against genocide, enslavement, and other inhumane acts, *see id.* at 847 (discussing Nuremberg Charter) — are the direct ances-

tors of the universal and fundamental norms recognized as *jus cogens*. In the words of the International Court of Justice, these norms, which include "principles and rules concerning the basic rights of the human person," are the concern of all states; "they are obligations *erga omnes*." *The Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3, 32.

Because *jus cogens* norms do not depend solely on the consent of states for their binding force, they "enjoy the highest status within international law." *CUSCLIN*, 859 F.2d at 940. For example, a treaty that contravenes *jus cogens* is considered under international law to be void *ab initio*. *See* Vienna Convention, art. 53; Restatement § 102 Comment k. Indeed, the supremacy of *jus cogens* extends over all rules of international law; norms that have attained the status of *jus cogens* "prevail over and invalidate international agreements and other rules of international law in conflict with them." Restatement § 102 Comment k. A *jus cogens* norm is subject to modification or derogation only by a subsequent *jus cogens* norm. *Id.*

The Sidermans claim that the prohibition against official torture has attained the status of a *jus cogens* norm. There is no doubt that the prohibition against official torture is a norm of customary international law, as the Second Circuit recognized more than ten years ago in the landmark case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Dr. Filartiga and his daughter, citizens of Paraguay, brought suit against Paraguayan officials who had tortured Dr. Filartiga's son to death. They alleged jurisdiction under the Alien Tort Statute, which grants the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Dr. Filartiga claimed that the defendants' torture of his son, perpetrated under color of official authority, violated a norm of customary international law prohibiting official torture, and the court agreed. Judge Kauf-

man, writing for the court, explained that "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody." 630 F.2d at 881. Judge Kaufman catalogued the evidence in support of this view, citing several declarations of the United Nations General Assembly and human rights conventions prohibiting torture,[15] modern municipal law to the same effect, and the works of jurists, and finally concluded "that official torture is now prohibited by the law of nations." *Id.* at 884.

Other authorities have also recognized that official torture is prohibited by customary international law. In *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987), a suit predicated on atrocities committed by the same Argentine military government alleged to be responsible for the torture of Jose Siderman, the district court held that "official torture constitutes a cognizable violation of the law of nations," and described the prohibition against official torture as "universal, obligatory, and definable." Similarly, in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (opinion of Edwards, J.), *cert. denied*, 470 U.S. 1003 (1985), which involved an action against the Palestine Liberation Organization for its acts of terrorism, Judge Edwards identified torture as a violation of customary international law. Judge Bork, although raising considerable opposition to the application of customary international law in U.S. courts, *see id.* at 801-19

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[15]Judge Kaufman cited the Universal Declaration of Human Rights, G.A. Res. 217A(III), 3 U.N. GAOR Supp. (No. 16), U.N. Doc. A/810 (1948); Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975); American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. 1, O.A.S. Official Records OEA/Ser. 4 v/II 23, doc 21, rev. 2 (1975); International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200(XXI)a, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Council of Europe, Europ. T.S. No. 5, 213 U.N.T.S. 211 (1968).

(opinion of Bork, J.), at the same time conceded that the international law prohibition against torture is not disputed. *Id.* at 820. The Restatement of Foreign Relations also holds to the view that customary international law prohibits official torture. Restatement § 702(d). Finally, the world now has an international agreement focused specifically on the prohibition against torture: The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp. (No. 51), 23 I.L.M. 1027 (1984) [hereinafter "Torture Convention"], which entered into force on June 26, 1987. The United States signed the Torture Convention in April 1988, the United States Senate gave its advice and consent in October 1988, *see* 136 Cong. Rec. S17486-92 (daily ed. October 27, 1990), and it now awaits the President's filing of the instrument of ratification with the Secretary-General of the United Nations.[16]

In light of the unanimous view of these authoritative voices, it would be unthinkable to conclude other than that

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[16]The Torture Convention defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Torture Convention, art. 1. The agreement also calls on each state party to take measures to prevent torture within its territory, *id.*, art. 2, and to "ensure that all acts of torture are offenses under its criminal law," *id.*, art. 4. States parties must either prosecute or extradite persons charged with torture. *Id.*, arts. 5-8. Each state party also must ensure that torture victims or their decedents "obtain[ ] redress and ha[ve] an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible." *Id.*, art. 14(1). Finally, the Torture Convention creates a "Committee against Torture," which is responsible for receiving and reviewing states' compliance with the agreement. *Id.*, arts. 17-24.

acts of official torture violate customary international law. And while not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status. In *CUSCLIN*, 859 F.2d at 941-42, the D.C. Circuit announced that torture is one of a handful of acts that constitute violations of *jus cogens*. In *Filartiga*, though the court was not explicitly considering *jus cogens*, Judge Kaufman's survey of the universal condemnation of torture provides much support for the view that torture violates *jus cogens*. In Judge Kaufman's words, "[a]mong the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture." 630 F.2d at 890. Supporting this case law is the Restatement, which recognizes the prohibition against official torture as one of only a few *jus cogens* norms. Restatement § 702 Comment n (also identifying *jus cogens* norms prohibiting genocide, slavery, murder or causing disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination). Finally, there is widespread agreement among scholars that the prohibition against official torture has achieved the status of a *jus cogens* norm. *See, e.g., Implied Waiver, supra*, at 389, 393-94; Parker & Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 Hastings Int'l & Comp. L. Rev. 411, 437-39 (1989); *Human Rights in Domestic Courts, supra*, at 354 n.111; Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785, 830 (1988).

Given this extraordinary consensus, we conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being. That states engage in official torture cannot be doubted, but all states believe it is wrong,

all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens. *See Filartiga*, 630 F.2d at 884 (noting that no contemporary state asserts "a right to torture its own or another nation's citizens"); *id.* at n.15 ("The fact that the prohibition against torture is often honored in the breach does not diminish its binding effect as a norm of international law."). Under international law, any state that engages in official torture violates *jus cogens*.

The question in the present case is what flows from the Sidermans' allegation that Argentina tortured Jose Siderman and thereby violated a *jus cogens* norm. The Sidermans contend that when a foreign state's act violates *jus cogens*, the state is not entitled to sovereign immunity with respect to that act. This argument begins from the principle that *jus cogens* norms "enjoy the highest status within international law," *CUSCLIN*, 859 F.2d at 940, and thus "prevail over and invalidate ... other rules of international law in conflict with them," Restatement § 102 Comment k. The Sidermans argue that since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*. In short, they argue that when a state violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the state amenable to suit.

As a matter of international law, the Sidermans' argument carries much force. We previously have recognized that "[s]overeign immunity is a principle of international law." *International Ass'n of Machinists & Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354, 1359 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). Chief Justice Marshall identified the foundation of the doctrine of sovereign immunity as the "perfect equality and absolute independence of sovereigns," a state of affairs making it improper for one state to subject another to its jurisdiction. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137. As described by one scholar of international law, the doctrine of foreign sovereign immunity "is rooted in

two bases of international law, the notion of sovereignty and the notion of the equality of sovereigns." Riesenfeld, *Sovereign Immunity in Perspective*, 19 Vand. J. Transnat'l L. 1 (1986). When Jack Tate, writing on behalf of the State Department, issued his famous letter in 1952, the United States was recognizing the trend in international law toward adoption of the restrictive principle of foreign sovereign immunity, under which states receive immunity for their sovereign acts (*jure imperii*) but not their private acts (*jure gestionis*). With the enactment of the FSIA, Congress explicitly adopted the restrictive principle, identifying its origin in international law. 28 U.S.C. § 1602 (findings and declaration of purpose); *see also* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6605 (FSIA "would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law"); *id.* at 8, 1976 U.S. Code Cong & Admin. News at 6606 ("Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state."); *id.* at 9, 1976 U.S. Code Cong. & Admin. News at 6608 ("[S]overeign immunity is a question of international law to be determined by the courts.").

The Sidermans posit that because sovereign immunity derives from international law, *jus cogens* supersedes it. "*Jus cogens* norms represent the fundamental duties incident to international life. They are an essential component of the modern law definition of sovereignty." *Implied Waiver*, *supra*, at 392. International law does not recognize an act that violates *jus cogens* as a sovereign act. A state's violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law.

Unfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the FSIA. We must interpret the

FSIA through the prism of *Amerada Hess*. Nothing in the text or legislative history of the FSIA explicitly addresses the effect violations of *jus cogens* might have on the FSIA's cloak of immunity. Argentina contends that the Supreme Court's statement in *Amerada Hess* that the FSIA grants immunity "in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions," 488 U.S. at 436, precludes the Sidermans' reliance on *jus cogens* in this case. Clearly, the FSIA does not specifically provide for an exception to sovereign immunity based on *jus cogens*. In *Amerada Hess*, the Court had no occasion to consider acts of torture or other violations of the peremptory norms of international law, and such violations admittedly differ in kind from transgressions of *jus dispositivum*, the norms derived from international agreements or customary international law with which the *Amerada Hess* Court dealt. However, the Court was so emphatic in its pronouncement "that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions," *Amerada Hess*, 488 U.S. at 436, and so specific in its formulation and method of approach, *id.* at 439 ("Having determined that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court, we turn to whether any of the exceptions enumerated in the Act apply here"), that we conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.

B. Existing Treaty Exception

The FSIA section establishing the general rule of foreign sovereign immunity in United States courts, 28 U.S.C. § 1604, provides that the rule of immunity is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of" the FSIA. In *Amerada Hess*, the plaintiffs argued that Argentina's immunity was

subject to the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention and that those treaties created an exception to FSIA immunity under section 1604. The Court rejected the argument, adopting a narrow view of section 1604:

> This exception applies when international agreements expressly conflict with the immunity provisions of the FSIA, hardly the circumstances in this case. [The Geneva and Pan American Conventions] only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts.

488 U.S. at 442 (internal quotations, alterations, and citations omitted). Thus, the Court erected a serious obstacle to claims that, by subscribing to a treaty or other international agreement, a defendant state loses its immunity under the FSIA.

The Sidermans argue that Argentina's immunity under the FSIA is "subject to" the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948), and the United Nations Charter. Neither of these documents can support the weight the Sidermans place on them. The Universal Declaration of Human Rights is a resolution of the General Assembly of the United Nations. As such, it is a powerful and authoritative statement of the customary international law of human rights. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 882-84 (2d Cir. 1980). However, it is not an "international agreement" within the meaning of section 1604. While the meaning of that term may not be restricted to treaties that the United States has ratified pursuant to Article II, Section 2 of the Constitution, *see* Restatement, Intro. Note to Part III, at 146, the legislative history of the FSIA reveals that Congress intended the FSIA to be subject to enforceable agreements between the United States and other foreign states or interna-

tional organizations. The House Report refers to several examples of "international agreements," including the NATO Status of Forces Agreement, and treaties of friendship, commerce and navigation. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17-18, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6616. These international agreements, which are intended by the parties to be legally binding under international law, are categorically different from the Universal Declaration of Human Rights, which creates legal obligations only insofar as it represents evidence of customary international law. We see no indication in the FSIA or its legislative history that Congress intended the term "international agreements" to include non-binding resolutions of the General Assembly of the United Nations.

The United Nations Charter, in contrast to the Universal Declaration, is a treaty of the United States. However, the Sidermans have been unable to point out any language in the Charter regarding individual remedies or compensation for violations of its substantive rules of conduct. In contrast, the treaties that were at issue in *Amerada Hess* were quite specific about the rights to compensation of merchant ships in time of war. *See Amerada Hess*, 488 U.S. at 442 n.10. For example, the Pan American Maritime Neutrality Convention provides that belligerents must indemnify any damage they cause to neutral merchant ships. *Id.* Despite these specific remedial provisions, the Court was unwilling to hold that the treaties expressly conflicted with the immunity created by the FSIA, and thus found section 1604 inapplicable. We cannot, consistently with *Amerada Hess*, accept the Sidermans' argument that the U.N. Charter expressly conflicts with the FSIA when the Charter does not even discuss compensation or individual remedies.

We hold that the Sidermans have failed to identify an international agreement to which the United States is a party that "expressly conflict[s] with the immunity provisions of the

FSIA." *Amerada Hess*, 488 U.S. at 442. The existing treaty exception of section 1604 does not apply to the torture claims.

C. Implied Waiver Exception

[13] The FSIA provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." 28 U.S.C. § 1605(a)(1). The Sidermans contend that Argentina availed itself of our courts in its pursuit of Jose Siderman and, in doing so, implicitly waived its immunity defense with respect to their claims for torture and persecution. They assert that after the elder Siderman fled to this country, Argentina commenced malicious criminal proceedings against him in Argentina, and requested the assistance of the California state courts in obtaining jurisdiction over his person. The California courts, unaware of Argentina's true intentions, complied by effecting service of process.

Argentina did not controvert the Sidermans' implicit waiver argument in the district court.[17] As is true with respect

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[17]Argentina's sole contention below with respect to the Sidermans' torture claims was that the FSIA's noncommercial tort exception, section 1605(a)(5), precludes an immunity defense only in cases where a sovereign has engaged in tortious activity within the territorial jurisdiction of the United States. We so held in *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984), where we stated that "nothing in the legislative history [of section 1605(a)(5)] suggests that Congress intended to assert jurisdiction over foreign states for events occurring wholly within their own territory." *Id.* at 588; *see also Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 331 (9th Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984) ("Subsection (a)(5) requires 'personal injury, or death . . . occurring in the United States . . .' "). The Supreme Court confirmed our position in *Amerada Hess*, 488 U.S. at 439 ("Section 1605(a)(5) is limited by its terms . . . to those cases in which the damage to or loss of property occurs *in the United States*." (emphasis in original)). The Sidermans have never relied upon section 1605(a)(5), however, in asserting that jurisdiction exists over their claims for torture.

to the commercial activity and international takings clauses on which the Sidermans base jurisdiction for their expropriation claims, then, the only material before us on the subject of waiver is that presented by the Sidermans. We conclude that their allegations and evidence suffice to bring their claims for torture within section 1605(a)(1) of the FSIA. On remand, Argentina will have an opportunity to rebut the Sidermans' evidence. At this stage of the proceedings, however, we are unable to say that the Sidermans' arguments as to implied waiver are devoid of merit.

The FSIA's waiver exception "is narrowly construed." *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). The House Report accompanying the passage of the FSIA gives three examples of an implied waiver:

> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617. The House Report does not purport to provide an exclusive list of the circumstances giving rise to implied waivers, however, and we have not construed it in this fashion. Thus, while we stated in *Joseph* that implied waivers will "ordinarily [be] found" only in the three situations mentioned in the legislative history, 830 F.2d at 1022 (citing *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985)), we went beyond those examples to establish the more general proposition that where a written agreement entered into by a foreign sovereign "contemplates adjudication of a dispute by the

United States courts," we will find the sovereign to have waived its immunity. *Joseph*, 830 F.2d at 1023.

We concluded in *Joseph* that the Federal Republic of Nigeria, by signing a lease agreement which stated that the prevailing party in any court dispute arising out of its terms would be entitled to attorney's fees, had rendered itself susceptible to suit in our courts. The lease did not provide specifically for the adjudication of disputes in the United States. Nor did it state that United States law would govern such actions. Thus, it did not fall into one of the categories mentioned by the House Report. However, because the lease at issue concerned a house in San Francisco which Nigeria had rented as a consulate, we surmised that Nigeria must have had United States courts in mind when it agreed to its adjudicatory provisions. And since Nigeria could reasonably be said to have contemplated "participation of the United States courts in [its] disputes" with its landlord, 830 F.2d at 1023, we found it to have waived its immunity from a suit brought by that landlord.

Other courts have similarly focused on the question whether a sovereign defendant entering into a written agreement envisioned the involvement of United States courts in its dealings with another party. In *Marine Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983), for example, the D.C. Circuit declined to find a waiver of immunity where the treaty on which the plaintiff premised its waiver argument "concededly did not foresee a role for the United States courts . . . ." *Id.* at 1104. Similarly, in *Frolova*, the Seventh Circuit held that the former Soviet Union had not waived its immunity in signing various international agreements where it could not have "anticipated . . . that American courts would be the means by which the documents' provisions would be enforced." And in *Liberian Eastern Timber Corp. v. Republic of Liberia*, 650 F.Supp. 73, 76 (S.D.N.Y. 1986), *aff'd*, 854 F.2d 1314 (2d Cir. 1987), Judge Weinfeld found that Liberia

had waived its immunity from the enforcement of an arbitration award by entering into a treaty which "clearly contemplated the involvement of the courts of any of the Contracting States, including the United States as a signatory to the Convention, in enforcing the pecuniary obligations of the award." *Cf. Amerada Hess*, 488 U.S. at 442-32 (finding no basis for concluding that Argentina had waived its immunity, explicitly or implicitly, "by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States.").

Thus, the essential inquiry in written agreement cases is whether a sovereign contemplated the involvement of United States courts in the affair in issue. Here, we confront a situation where Argentina apparently not only envisioned United States court participation in its persecution of the Sidermans, but by its actions deliberately implicated our courts in that persecution. The Sidermans have presented evidence that a year after Jose, Lea and Carlos Siderman fled Argentina in fear for their lives, the Argentine military authorities altered the Tucuman provincial land records to show that they had held title only to 127, as opposed to 127,000, acres of land in the Province, and that in their last-minute efforts to raise cash they had thus sold property which did not belong to them. The Tucuman Public Prosecutor then initiated criminal proceedings against Jose Siderman for this "fraudulent" sale, and had the Tucuman Supreme Court enlist the aid of our courts, via a letter rogatory, in serving him with process.[18] The letter rogatory, dated May 11, 1980, informed the Presiding Judge of the Los Angeles Superior Court that criminal proceedings

[18]The Sidermans have presented material indicating that after the military coup in 1976, the Argentine courts were transformed into puppets of the military regime. In addition to presenting general evidence of this transformation, the Sidermans have alleged that those judges who stood in the way of the authorities' efforts to expropriate their properties were mysteriously removed from office while other, more "loyal", judges were used to legitimize the activities of the new government.

were pending against Jose Siderman in the Supreme Court of Tucuman. It requested the court's assistance in serving papers on Siderman, who was living in Los Angeles at the time. While the court complied with the request, the record is not clear as to the subsequent course of the lawsuit. In their papers in support of jurisdiction, the Sidermans suggest that the Argentine military authorities sought to obtain Jose's return to Argentina in order to further torture and perhaps even to kill him.[19]

Shortly after the Los Angeles Superior Court received Argentina's letter rogatory, indeed, Argentina requested that the Italian authorities arrest Siderman, who had travelled to Italy for a wedding, and extradite him to Argentina for having allegedly forged certain travel documents. Siderman was detained in Italy for seven months, twenty-seven days of which time was spent in prison, before an Italian court dismissed the charges against him as pretextual and denied Argentina's extradition request.

We conclude that the Sidermans have presented evidence sufficient to support a finding that Argentina has implicitly waived its sovereign immunity with respect to their claims for torture. The evidence indicates that Argentina deliberately involved United States courts in its efforts to persecute Jose Siderman. If Argentina has engaged our courts in the very course of activity for which the Sidermans seek redress, it has waived its immunity as to that redress.

As noted, Argentina will have an opportunity to rebut the Siderman's evidence on remand. We do not suggest that

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[19]In its letter to the United States Department of State declaring immunity from the Sidermans' suit, dated February 16, 1983, Argentina stated that Jose Siderman's presence before the Supreme Court of Tucuman was desired in relation to the property fraud charges. The letter noted Argentina's request of assistance from the Superior Court of Los Angeles in the matter.

because Argentina may have implicitly waived its immunity in this suit, any foreign sovereign which takes actions against a private party in our courts necessarily opens the way to all manner of suit by that party. To support a finding of implied waiver, there must exist a direct connection between the sovereign's activities in our courts and the plaintiff's claims for relief. Only because the Sidermans have presented evidence indicating that Argentina's invocation of United States judicial authority was part and parcel of its efforts to torture and persecute Jose Siderman have they advanced a sufficient basis for invoking that same authority with respect to their causes of action for torture. It will be up to the district court on remand to determine whether the requisite direct connection exists. If it does, Argentina will be subject to the court's jurisdiction for the torture claims.

The district court erred in dismissing the Sidermans' torture claims.

CONCLUSION

The Sidermans' complaint and the evidence they have presented in support of their allegations paint a horrifying portrait of anti-Semitic, government-sponsored tyranny. The record that so far has been developed in this case reveals no ground for shielding Argentina from the Sidermans' claims that their family business was stolen from them by the military junta that took over the Argentine government in 1976. It further suggests that Argentina has implicitly waived its sovereign immunity with respect to the Sidermans' claims for torture.

We REVERSE and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV 82-1772-RMT(MCx)

SUSANA SIDERMAN DE BLAKE; JOSE SIDERMAN; CARLOS SIDERMAN; and LEA SIDERMAN;, individuals,
Plaintiffs,

vs.

THE REPUBLIC OF ARGENTINA, a foreign country; THE PROVINCE OF TUCUMAN OF THE REPUBLIC OF ARGENTINA, a province of a foreign country; OSCAR HONORATO; ABELARDO GARCIA; CARLOS RASALES; VICTOR EDUARDO MOLINA; GENERAL DOMINGO BUSSI; CAPTAIN ABAS; GENERAL LINO MONTIEL FORZANO; GENERAL ANTONIO MERLO; individuals; INMOBILIARIA DEL NOR-OESTE, S.A.; an Argentine corporation,

Defendants.

ORDER RE: SUBJECT MATTER JURISDICTION AND PERSONAL JURISDICTION

This matter having come before the court for hearing on March 12, 1984 on the motion by plaintiff for default judgment, and this court having considered the pleadings and other documents filed herein and argument of counsel, and having found that this court has subject matter jurisdiction with respect to the claims for torture but that the act of state doctrine applies to the claims regarding the taking of property and having further found that there

is personal jurisdiction over the Republic of Argentina and the Province of Tucuman but there is no personal jurisdiction over the other defendants,

IT IS ORDERED that a further hearing shall be held at 2:00 p.m. on April 2, 1984 on prove-up on damages with respect to plaintiffs' claims for torture as against defendants Republic of Argentina and Province of Tucuman and that plaintiffs shall file their brief, supported by evidence, no later than March 22, 1984.

Dated: MAR 14 1984, 1984.

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX C

No. CV 82-1772-RMT(MCx)

SUSANA SIDERMAN DE BLAKE; JOSE SIDERMAN; CARLOS SIDERMAN; and LEA SIDERMAN; individuals,
Plaintiffs,

vs.

THE REPUBLIC OF ARGENTINA, a foreign country; THE PROVINCE OF TUCUMAN OF THE REPUBLIC OF ARGENTINA, a province of a foreign country; OSCAR HONORATO; ABELARDO GARCIA; CARLOS ROSALES; VICTOR EDUARDO MOLINA; GENERAL DOMINGO BUSSI; CAPTAIN ABAS; GENERAL LINO MONTIEL FORZANO; GENERAL ANTONIO MERLO; individuals; INMOBILIARIA DEL NOR-OESTE, S.A., an Argentine corporation,
Defendants.

JUDGMENT BY DEFAULT

FILED

SEP 28 1984

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

In this action, defendants Republic of Argentina and Province of Tucuman of the Republic of Argentina were duly served with summons and complaint according to law. It is noted that on March 28, 1983, a letter sent to the court from the United States Department of State was filed herein. Said letter indicates that the Embassy of the

Argentine Republic transmitted a diplomatic note to the State Department claiming sovereign immunity in this action. The State Department informed the Embassy that said department was not in a position to comment on this action and advised the Embassy that any defenses and claims must be addressed to this court. However, defendants Republic of Argentina and Province of Tucuman of the Republic of Argentina have failed to appear and their defaults have been duly entered.

By order filed on March 14, 1984, this court found that pursuant to 28 U.S.C. §1350 it has subject matter jurisdiction over the claims for torture but that the act of state doctrine applies to and bars the claims regarding the taking of property. This court further found that personal jurisdiction exists as to defendants Republic of Argentina and Province of Tucuman of the Republic of Argentina but does not exist as to the other defendants herein.

The present matters before this court are plaintiffs' motion for reconsideration regarding this court's order on the applicability of the act of state doctrine and plaintiffs' motion for default judgment.

RECONSIDERATION MOTION

In their motion for reconsideration, plaintiffs advance the position taken by the State Department in *Bernstein v. N.V. Nederlandsche-Amerikaanasche*, 210 F.2d 375 (2nd Cir. 1954), and *Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984) as the reasons why the act of state doctrine should not bar their claims for wrongful taking of their properties.

The act of state doctrine is prudential in nature, designed to avoid judicial action in sensitive areas of foreign policy. *International Association of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981). It "derives from the judiciary's concern for its possible interference with the con-

duct of foreign affairs by the political branches of the government." *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 605 (9th Cir. 1976).

In *Banco Nationale de Cuba v. Sabbatino*, 376 U.S. 398 (1964) the Supreme court held that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428.

Plaintiffs contend that *Bernstein, supra*, provides an exception to the *Sabbatino* rule and that said exception applies to them.

Bernstein, supra, is clearly distinguishable from the instant case and even supports the application of the act of state doctrine herein. In *Bernstein*, the State Department issued a letter indicating that judicial intervention would not interfere with the foreign policy of the Executive and took an express position to relieve the court from any restraint on the exercise of jurisdiction. The Second Circuit Court of Appeals relied on that express position of the Executive in removing any restraints to the court's exercise of jurisdiction. It is unclear whether *Bernstein* affords an exception to the rule laid down in *Sabbatino*.[1] In

[1] The viability of the "*Bernstein* exception" is questionable in light of the Supreme Court's ruling in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972). Justice Rehnquist, in a plurality opinion in which two other justices joined, recognized a "*Bernstein* exception" to the act of state doctrine where the Executive expresses a position in the case urging that the doctrine not be applied. Justice Douglas concurred in the result and Justice Powell concurred in the judgment, both finding reasons why the act of state doctrine should not apply but both not relying on a "*Bernstein* exception." Justice Brennan's dissenting opinion, in which three other justices joined,

Sabbatino, the Supreme Court recognized the existence of the *Bernstein* case and, expressly, did not "pass upon the so-called *Bernstein* exception," 376 U.S. at 420, because in *Sabbatino*, letters from the State Department were issued indicating the Department's wish not to make any statement bearing on the litigation. Even if a "*Bernstein* exception" could be interpreted consistently with *Sabbatino*, it would be a very limited exception as the Court in *Sabbatino* stated that

> "Even if the State Department has proclaimed the impropriety of the expropriation, the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront and the judicial decision might occur at a time, almost always well after the taking, when such an impact would be contrary to our national interest."

376 U.S. at 432.

Assuming the viability of the "*Bernstein* exception," it does not apply here. In the instant action, the State Department has not taken the position it took in *Bernstein*. In fact, the position taken by the State Department here is very similar to its position taken in *Sabbatino*. The letter sent to this court by the State Department filed herein on March 28, 1983 states that "[t]he Embassy [of the Argentine Republic] was informed that under the laws of the United States the Department of State is not in a position to comment on the present suit." The letter to the court expresses no further position.

Plaintiffs also argue that an exception to the act of state doctrine recognized in *Kalamazoo Spice Extraction Co. v.*

---

strongly objected to recognizing an exception to the doctrine by the judiciary solely upon the desires of the Executive and stated that the "Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim." 406 U.S. at 789.

The Provisional Military Government of Socialist Ethiopia, supra, should be applied here. In *Kalamazoo,* the Sixth Circuit Court of Appeals recognized a "treaty exception" to the act of state doctrine. This exception is derived from the language in *Sabbatino, supra,* quoted above, whereby the doctrine applies "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles. . ." 376 U.S. at 428. The *Kalamazoo* court held that the treaty in existence between the United States and Ethiopia, the 1953 Treaty of Amity and Economic Relations, provided a controlling legal standard and, thus, justified a "treaty exception" to the act of state doctrine. The court further stated there was no danger that adjudication would interfere with the Executive as it had intervened therein through the Departments of State, Treasury, and Justice who had filed a joint amicus brief urging the treaty exception to the doctrine. 729 F.2d at 427.

Herein, plaintiffs cite no treaty or other agreement between the United States and the Republic of Argentina. As such there is no controlling legal standards to justify an exception to the act of state doctrine.

This court therefore concludes that the act of state doctrine applies to and bars the claims herein regarding the taking of property.

FACTS

Plaintiffs have established by evidence satisfactory to this court the following underlying facts:

Plaintiffs Jose and Lea Siderman are husband and wife; plaintiffs Carlos Siderman and Susana Siderman de Blake are their children. All of the plaintiffs were born in the Republic of Argentina and formerly resided in the Province of Tucuman. Plaintiffs Jose, Lea and Carlos are presently permanent residents of the United States. Plaintiff Susana

came to the United States in 1964 and became a citizen of the United States in 1967.

In March of 1976, while Jose, Lea and Carlos were still residing in Tucuman, the Argentine President was removed by military coup and a military junta was installed to govern the country. On the night of the coup, men from the military came to the home of Jose and Lea, assaulted both of them, locked Lea in a room and forcibly took Jose away. Jose was kept for seven days during which time he was physically tortured and threatened that he and his family would be killed if they did not immediately leave Argentina. The day following Jose's release, Jose and Lea fled to Buenos Aires. Shortly thereafter, Carlos left Tucuman and went to Buenos Aires. Prior to leaving for Buenos Aires, Jose sold some of the 127,000 acres of land that he owned in Tucuman. In June 1976, Jose, Lea and Carlos left Buenos Aires and came to the United States.

Prior to leaving Argentina, the Siderman family gave their power of attorney to an accountant who, thereafter, was imprisoned and has apparently disappeared. The Siderman family then gave their power of attorney to their Argentine attorney.

In April 1977, the military, through an intervention, seized the Inmobiliaria del Nor-Oeste, S.A. ("INOSA") which was a closely held corporation owned by the Siderman family and which owned and operated the Hotel Gran Corona. This seizure resulted in the imposition of a receivership through a court system which was created by the ruling military. Attempting to fight this seizure, the Sidermans, through their Argentine attorney, brought an action in 1978 in the Civil and Commercial Court of Tucuman. The court issued an order that the intervention cease. However, prior to the order being enforced, the judge resigned. The intervention continues.

In 1981, Jose Siderman left the United States for a trip to Italy. He was arrested in Italy in May 1981 pursuant

to a request by Argentina for his extradition. In December 1981, the Italian Court denied the request for extradition. Thereafter, Jose Siderman was allowed to return to the United States.

Plaintiffs have alleged several causes of action based on the taking of property from the Sidermans, the torture of Jose Siderman and Lea Siderman's claim for loss of consortium.

Having duly considered the issues regarding the act of state doctrine as a bar to the claims for taking of property,

IT IS ORDERED that the motion by plaintiffs for reconsideration re act of state is respectfully denied.

Based upon the claims for the torture of Jose Siderman and the loss of consortium by Lea Siderman and the evidence produced by plaintiffs, and this court having found that plaintiffs Lea Siderman, Carlos Siderman and Susana Siderman de Blake have no standing to claim damages for the torture of Jose Siderman,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs Jose Siderman and Lea Siderman recover from defendants Republic of Argentina and Province of Tucuman of the Republic of Argentina, and each of them, as follows:

(1) Defendants Republic of Argentina and Province of Tucuman of the Republic of Argentina, and each of them, are liable to Jose Siderman on his torture claim for the following damages caused by the physical torture of Jose Siderman in March 1976:

(a) $1,000,000.00 for pain and suffering and emotional distress;

(b) $250,000.00 for physical injuries;

(c) $1,200,000.00 for loss of earnings;

(d) $7,515.63 for medical expenses; and

(e) $150,000.00 for moral damages; for a total award of $2,607,515.63.

(2) Defendants Republic of Argentina and Province of Tucuman of the Republic of Argentina, and each of them, are liable to plaintiff Lea Siderman on her claim for loss of consortium in the sum of $100,000.00.

IT IS FURTHER ORDERED that plaintiffs Carlos Siderman and Susana Siderman de Blake recover nothing from defendants.

Dated: 9/28, 1984.

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX D

No. CV 82-1772-RMT(MCx)

SUSANA SIDERMAN DE BLAKE; JOSE SIDERMAN; CARLOS SIDERMAN; and LEA SIDERMAN; individuals,
Plaintiffs,

vs.

THE REPUBLIC OF ARGENTINA, a foreign country; THE PROVINCE OF TUCUMAN OF THE REPUBLIC OF ARGENTINA, a province of a foreign country; OSCAR HONORATO; ABELARDO GARCIA; CARLOS ROSALES; VICTOR EDUARDO MOLINA; GENERAL DOMINGO BUSSI; CAPTAIN ABAS; GENERAL LINO MONTIEL FORZANO; GENERAL ANTONIO MERLO; individuals; INMOBILIARIA DEL NOR-OESTE, S.A., an Argentine corporation,
Defendants.

ORDER VACATING DEFAULT JUDGMENT AND DISMISSING ACTION

FILED

MAR 7 1985

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

This matter has come before the court for reconsideration on the issue of foreign sovereign immunity pursuant to this court's order filed herein on October 30, 1984. Since the filing of said order, defendants Republic of Argentina and Province of Tucuman have filed a motion for relief

from judgment based on their claim of foreign sovereign immunity.

The court having duly considered the pleadings and other documents filed herein finds that neither the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602 *et seq.*, nor the Alien Tort Claims Act, 28 U.S.C. §1350, provides an exemption from defendants' foreign sovereign immunity applicable in this action.

Although it could be argued that 28 U.S.C. §1350 provides an exception to foreign sovereign immunity, said statute in its grant of subject matter jurisdiction is silent as to its intended effect on foreign sovereign immunity. Whether this silence should be interpreted as impliedly effecting an exemption to foreign sovereign immunity requires an examination of the state of the immunity law at the time of enactment. It appears that when 28 U.S.C. §1350 was originally enacted in 1789, the longstanding general rule was the recognition of absolute foreign sovereign immunity, especially as to acts of sovereigns within their own geographic territory. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). This immunity was only questioned as to public ships of a foreign sovereign found within the geographic jurisdiction of another sovereign, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), because such a case would raise a question as to the strength of the logical corollary to absolute immunity, the corollary being the recognition of a sovereign's absolute jurisdiction over its own territory. Although the Supreme Court in *The Santissima Trinidad, supra*, explored the extent of foreign sovereign immunity in connection with claims to foreign public ships found within the geographic territory of the U.S., it did not reach that issue, holding simply that "whatever may be the exemption [(immunity)] of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts. . ." 20 U.S. at 354.

The longstanding general rule of foreign sovereign immunity recognized in *Schooner Exchange, supra,* indicates that when 28 U.S.C. §1350 was enacted, the legal status quo was the recognition of immunity. The logical implication would be that if Congress intended to affect that immunity, it would have done so expressly and specifically, such that silence would imply, if anything, no intended affect on the general recognition of foreign sovereign immunity. *As such, 28 U.S.C. §1350 does not provide an exemption to foreign sovereign immunity herein.*

To the extent plaintiffs argue that their claim is one against Argentina's property located within the geographic territory of the United States, that contention is misapplied. All of plaintiffs claims challenge defendants' acts that occurred in Argentina and are not claims on or to Argentina's property located in the United States. The only connection plaintiffs' claim could have to any Argentina property located in the United States, if any, would be the rights a judgment creditor has to post-judgment attachments. Those rights arise post-judgment and are not in issue herein.

With respect to the Foreign Sovereign Immunities Act, none of the enumerated exceptions to immunity listed in 28 U.S.C. §1605 apply herein. The only arguable exception appears to be the extent to which any international agreement might so provide. 28 U.S.C. § 1604.

The United Nations Charter and the Universal Declaration of Human Rights (as well as most other international human rights agreements) are proclamations of aspirations to certain international goals and do not waive immunity from suit.

The Organization of American States ("OAS") through the American Convention on Human Rights has set up the Inter-American Commission on Human Rights ("Commission") and the Inter-American Court of Human Rights. After exhausting domestic remedies, or waiver thereof, an

individual can bring a case against a state before the Commission. If the Commission is unsuccessful in settling the case, it can bring the matter before the Inter-American Court of Human Rights. As such, the OAS appears to provide plaintiffs with their remedy, although it provides no basis for waiving immunity herein.

Accordingly,

IT IS ORDERED that the default judgment entered herein is vacated and the action is dismissed.

Dated: March 7, 1985.

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX E

The Superior Court
Los Angeles, California 90012
Chamber of
Julius M. Title, Judge

July 22, 1981

Mr. Jose Siderman
c/o Math Master
3700 South Broadway
Los Angeles, California

RE: Government of the Province of Tucuman
vs. Jose Siderman, Case Number 2007/77
Province of Tucuman, Republic of Argentina

Dear Mr. Siderman:

The Los Angeles Superior Court has received the enclosed documents from the Presiding Judge of the Supreme Court of the Province of Tucuman, Republic of Argentina, which apparently relate to a lawsuit filed against you in Argentina. These documents have been delivered to the Presiding Judge of the Los Angeles Superior Court by the local attorney for the Argentine Government, and we have been requested by said attorney to send these documents on to you so as to advise you of the pendency of said action in Argentina.

We are complying with this request as a matter of judicial cooperation and comity, but we express no opinion as to the legal effect of this suit or of the effect of our sending these documents on to you.

You may wish to take the matter up with your own attorney, or, if you wish, you may contact the attorney for the Argentine Government who delivered these documents to the Los Angeles Superior Court, who is Jose

Mariano Castillo, Suite 203, 3243 Wilshire Boulevard, Los Angeles, California 90010, Telephone Number 380-8900.

Very truly yours,

/s/ Julius M. Title
Julius M. Title

JMT:bd
Enclosures

cc: Jose Mariano Castillo, Esquire
Suite 203, 3243 Wilshire Boulevard
Los Angeles, California 90010

(2)
FILED
OCT 13 1992
OFFICE OF THE CLERK

No. 92-320

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

REPUBLIC OF ARGENTINA and PROVINCE OF TUCUMAN, ARGENTINA,
Petitioners,

vs.

SUSANA SIDERMAN DE BLAKE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari where the Court of Appeals remanded the case to the district court to consider whether that court has subject matter jurisdiction over the case pursuant to the Foreign Sovereign Immunities Act of ("FSIA") and where the question of subject matter jurisdiction under the FSIA was never fully considered by the district court?

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No. 91-712

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

REPUBLIC OF ARGENTINA and PROVINCE OF TUCUMAN, ARGENTINA,
Petitioner,

vs.

SUSANA SIDERMAN DE BLAKE, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATED COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Respondents, Susana Siderman De Blake and Jose, Lea, and Carlos Siderman ("the Sidermans"), submit this brief in opposition to the Petition for Writ of Certiorari filed by The Republic of Argentina and the Province of Tucumán ("Argentina").

STATEMENT

1. Nature of the Case

This case involves an action against the Government of Argentina and the Argentine Province of Tucumán for (1) the taking of plaintiffs' properties and (2) the torture of plaintiff Jose Siderman during the military dictatorship in Argentina. The harms suffered by the Sidermans are attributable to the anti-semitism of the military in Argentina during the dictatorship. Indeed, the facts of this case reveal the kinds of human rights abuses that inspired the creation of international human rights law in response to the Nazi Holocaust.

In their Complaint, filed before Argentina's return to democracy, the Sidermans alleged that the properties seized by the Argentine military dictatorship have been used, and are being used by Argentina, to do business in the United States.[1] Plaintiff Susana Siderman De Blake, the lead plaintiff, was an American citizen residing in the United States at the time of the taking of the properties. The other plaintiffs are naturalized American citizens who were Argentine nationals at the time the properties were seized by the military dictatorship.

Plaintiff Jose Siderman is suing for his torture in Argentina and for the taking of the properties. His wife, plaintiff Lea Siderman, is suing for the taking and for the loss

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[1] The properties include landholdings and an international resort hotel in the province of Tucumán. The Sidermans held these properties, including the hotel, through their family-owned Argentine corporation, Inmobilaria Del Nor-Oeste, S.A., known by its acronym INOSA. Plaintiff Susana Siderman De Blake, at all times relevant herein, was a one-third owner of INOSA.

of consortium stemming from Jose's torture. Their children, plaintiffs Carlos Siderman and Susana Siderman de Blake, are suing for the taking of the family-owned properties.

2. *The Proceedings In The District Court*

The Sidermans filed their Complaint against Argentina in 1982, and thereafter properly served their Summons and Complaint pursuant to the Foreign Sovereign Immunities Act ("FSIA"). Argentina, despite being advised by the United States Department of State to appear in court and defend the lawsuit, never responded to the Complaint.

The district court found Argentina in default. The district court dismissed the Sidermans' claims for the taking of the properties *sua sponte* on the basis of the act of state doctrine without determining if subject matter jurisdiction existed under the FSIA for these claims.

The district court later found it had subject matter jurisdiction over the Sidermans' claims for torture. In September, 1984, after the Sidermans submitted evidence to prove their torture claims, the district court issued its "Judgment by Default" against Argentina. The court awarded Jose Siderman approximately $2.6 million as damages for the torture and Lea Siderman $100,000 for loss of consortium stemming from the torture. No damages were awarded to the children, Susana and Carlos.

In January, 1985, Argentina first appeared in the case, arguing that they should be relieved from the default judgment. The United States concurrently filed a "Suggestion of Interest," asking the district court to allow Argentina to plead its case. The United States Government stated no position on the merits of the lawsuit.

The district court agreed to re-examine its judgment and found that it was barred by sovereign immunity from considering these claims. In March, 1985, the district court

vacated its September 1984 judgment and dismissed the entire action.

The Sidermans appealed to the United States Court of Appeals for the Ninth Circuit.

3. The Decision of The Ninth Circuit

The Ninth Circuit reversed in a 3-0 decision (The Ninth Circuit opinion, authored by Judge Betty Fletcher, is attached as Exhibit "A" to the Petition for Writ of Certiorari and is reported at 965 F.2d 699 (1992)).

The Ninth Circuit examined the Sidermans' taking (or expropriation) claims and torture claims separately.

a. Expropriation Claims

The Ninth Circuit found that the district court erred in dismissing the Sidermans'expropriation claims on the basis of the act of state doctrine. The error was two-fold. First, "[t]he district court erred in deciding the act of state issue without first considering the threshold issue of its subject matter jurisdiction." 965 F.2d at 706. Second, "[t]he district court erred in applying that doctrine before Argentina had even entered an appearance in the case." *Id.* at 713.

The Ninth Circuit then went on to examine whether the Sidermans met their initial burden of alleging subject matter jurisdiction under the FSIA. The Ninth Circuit found that the district court "made no findings of fact concerning jurisdiction." *Id.* at 707. The only record regarding jurisdiction under FSIA consisted "of the complaint and numerous declarations submitted by the Sidermans in support of their contention that certain of the FSIA exceptions apply, but includes no pleading or evidence from Argentina, which had not yet entered an appearance in the case when the

expropriation claims were dismissed [by the district court]." *Id.* at 707.

Accepting as true the allegations in Complaint and the supporting declarations, the Ninth Circuit found that the Sidermans sustained their initial burden in alleging jurisdiction under sections 1605(a)(2), the commercial activity exception, and 1605(a)(3), the international takings exception of the FSIA.

The facts which the Sidermans pleaded in their Complaint, supported by numerous declarations, were that Argentina expropriated the property of an American citizen, Susan Siderman de Blake, and then used those properties to conduct commercial activities in the United States. The largest piece of property expropriated was the Hotel Gran Corona, an international resort hotel which Argentina has used after the expropriation to conduct commercial tourist activities in the United States.

b. Torture Claims

The Ninth Circuit's analysis of the torture claims was similar to its analysis of the expropriation claims.

On appeal before the Ninth Circuit, the Sidermans conceded that the sole basis for finding subject matter jurisdiction for the torture claims was the FSIA. This concession was required by this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp, 488 U.S. 428 (1989)*, which held that the FSIA "provided the sole basis for obtaining jurisdiction over a foreign state in our court." Id. at 434.

The Sidermans raised three arguments before the Court of Appeals for why Argentina does not poses sovereign immunity under the FSIA for the torture claims. First, the Sidermans contended that Argentina is precluded from asserting the defense of sovereign immunity by the

international law principles of *jus cogens*, which the Sidermans contended confers jurisdiction under the FSIA. Second, the Sidermans contended that subject matter jurisdiction for the torture claims is present under the treaty exception, section 1604 of the FSIA. Third, the Sidermans contended that subject matter jurisdiction for these torture claims exists under the implied waiver exception, section 1605(a)(1) of the FSIA.

The Court of Appeals ruled against the Sidermans on their first two arguments. It held that neither the international principle of *jus cogens* nor the treaty exception provide a waiver of sovereign immunity in this case.

The Court of Appeals did find that allegations in the Sidermans' Complaint, together with the uncontroverted evidence presented with their declarations, met the initial burden of showing subject matter jurisdiction under the implied waiver exception provisions of section 1605(a)(1). These allegations were that the government of Argentina, after Jose Siderman fled to the United States to escape torture and religious persecution, commenced malicious criminal proceedings against him in Argentina, and then requested and obtained the assistance of California state courts in obtaining jurisdiction over him. This pursuit of Mr. Siderman by Argentina through California courts in the United States was part of the same continuing pattern of harassment, torture and religious persecution, by the military dictatorship then in power, against the Siderman family.

With these allegations, the Court of Appeals was "confront[ed with] a situation where Argentina apparently not only envisioned United States court participation in its persecution of the Sidermans, but by its actions deliberately implicated our courts in that persecution." 965 F.2d at 721-22. The Ninth Circuit held that such deliberate use of American courts by a foreign sovereign against a private party may lead to an implied waiver of sovereign immunity under 1605(a)(1) of the FSIA when that party later sues the foreign sovereign

for activities that stem from the same basis for which the foreign sovereign first used the American courts.

The court concluded that "[a]t this stage of the proceedings, however, we are unable to say that the Sidermans' argument as to implied waiver [under section 1605(a)(1) of the FSIA] are devoid of merit," *Id.* at 720. The Court of Appeals remanded the case to the district court for factual findings on this issue.

In general, the Court of Appeals stressed the preliminary nature of its opinion and the fact that Argentina would have a full opportunity to introduce evidence to refute the Sidermans' allegations and evidence when the district court considered the issue of subject matter jurisdiction on remand.

REASONS FOR DENYING THE WRIT

In an effort to convince this Court to grant certiorari in this case, Argentina accuses the Court of Appeals of issuing a decision in this case that is "bizarre," (Petition at 25.),"regrettable," (*Id.* at 26), and "not...motivated by purely legal considerations". *Id.* In fact, the Court of Appeals' opinion is in full conformity with the existing law of sovereign immunity. The opinion is narrow in its holding and limited to the particular facts of this case. Argentina has identified no conflict between the Court of Appeals opinion and any decision of this Court or of any Circuit.

The Ninth Circuit opinion merely holds that the Sidermans' complaint and declarations are sufficient to meet their initial burden of showing that the district court has subject matter jurisdiction under sections 1605(a)(1), (2) and (3) of the FSIA. The Court of Appeals remanded the case to the district court to determine whether subject matter jurisdiction is present after this issue is fully litigated by the parties. In its remand, the Ninth Circuit specifically directed the district court to allow Argentina to present for the first time evidence why subject matter jurisdiction is lacking.

I. THIS CASE IS PREMATURE FOR PLENARY REVIEW BY THIS COURT GIVEN THE COURT OF APPEALS REMAND TO THE DISTRICT COURT FOR FURTHER FACTUAL FINDINGS.

A. Expropriation Claims

The expropriation claims came to the Ninth Circuit, and now come to this Court, without any findings of fact by the district court on the question of whether subject matter jurisdiction exists for those claims. Rather, the district court dismissed the Sidermans' expropriation claims strictly on the

ground that they were barred by the act of state doctrine. The district court failed to consider at all whether it had subject matter jurisdiction over these claims under the FSIA. At the time that the district court rendered its decision on the expropriation claims, Argentina intentionally failed to appear in the case, and therefore presented no arguments to the district court why that court lacked subject matter jurisdiction over the case.

The Court of Appeals found that the district courts' *sua sponte* dismissal of the Sidermans' expropriation claims on act of state grounds clearly was in error. *See W.S. Kirkpatrick and Co. v. the Environmental Tectonics Corp., 493 U.S. 400 (1990).* Argentina does not quarrel with this holding.

Having found clear error by the district court in dismissing the expropriation claims on act of state grounds, the Court of Appeals went on to examine whether the Sidermans met their initial burden of alleging jurisdiction under the FSIA. The Court of Appeals found that the Sidermans indeed sustained their initial burden of showing that jurisdiction under the FSIA exists for the expropriation claims.

The court thereafter remanded the expropriation claims "in order to afford Argentina the opportunity to rebut the Sidermans' evidence and sustain its burden of proof before the district court." 965 F.2d at 708. In remanding the case for further factual finding on the issue of subject matter jurisdiction, the appellate court was merely applying existing law in the Ninth Circuit and followed by other Circuits.

In *Meadows v. Dominican Republic, 817 F.2d 517, 522-23 (9th Cir.), cert. denied, 484 U.S. 976 (1987),* the Ninth Circuit held, at least with regard to the commercial activity exception to the FSIA, that the district court should observe the following procedure:

> "Where, as here, the plaintiff alleges in his complaint that his claim is based on a foreign

> state's strictly commercial acts, the defendant must establish a prima facie case that it is a sovereign state and that the plaintiff's claim arises out of a public act. This proof establishes a presumption that the foreign state is protected by immunity. The plaintiff then has the burden of going forward with the evidence by offering proof that one of the exemptions applies. Once the plaintiff has presented this evidence, the defendant must prove its entitlement to immunity by a preponderance of the evidence."

In Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 779 (9th Cir. 1991)(quoting Joseph v. Consulate Gen'l of Nigeria, 830 F.2d 1018, 1021 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988)), the Ninth Circuit likewise stated:

> "Once the plaintiff offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply."

In their brief, Petitioners nowhere show that these procedural steps established by the Ninth Circuit for examining subject matter jurisdiction under the FSIA are in error. Moreover, they do not show that this procedure is in conflict with the decisions of this Court or with other courts of appeal. *See* G. Born & D. Westin, *International Civil Litigation in United States Courts: Commentary and Materials*,

399 (1990) ("Virtually all lower courts have followed this basic approach to burdens of proof under the FSIA.")[2]

It would be premature for this Court to grant certiorari at this point in this case. The Court should allow this case to be remanded to the district court, so that the district court can proceed with its task of determining whether it has subject matter jurisdiction over the Sidermans' expropriation claims.

B. Torture Claims

In dismissing the torture claims on the basis of sovereign immunity, the district court did not consider whether Argentina had waived its immunity to a lawsuit by the Sidermans when Argentina pursued the Sidermans in

---

[2] *See H.R. Rep. No. 1487, 94th Cong., 2d Sess. at 17, reprinted in* 1976 U.S. Code Cong. & Admin. News at 6616:

> [Because] sovereign immunity is an affirmative defense which must be especially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state -- that is, as act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of providing immunity would rest with the foreign state.

American courts as part of a vendetta against them, beginning with the torture of Jose Siderman, and thereby waived its sovereign immunity under section 1605(a)(1) of the FSIA.[3]

The Court of Appeals found that the Sidermans, in their pleadings and supporting evidence, met their initial burden of showing implied waiver under section 1605(a)(1). The Court remanded the torture claims to the district court for further findings, and to allow both sides for the first time to argue the issue of implied waiver.

As with the expropriation claims, the torture claims are not ripe for review by this Court.

II. THIS CASE DOES NOT WARRANT SUPREME COURT REVIEW BECAUSE IT PRESENTS A UNIQUE SET OF FACTUAL AND LEGAL ISSUES AND CREATES NO CONFLICTS AMONG CIRCUITS.

This case is not appropriate for review by this Court not only because of its preliminary procedural posture, but also because it involves unique and unusual factual circumstances and the Court of Appeals decision is not in conflict with the decisions of other Circuits

A. Expropriation Claims

The Sidermans have alleged that Argentina expropriated the properties and assets of Susana Siderman De Blake, an American citizen and the lead plaintiff in the case. The largest piece of property expropriated is an international resort hotel in Argentina, the Hotel Gran Corona, which has extensive commercial dealings with the United States.

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[3] The District Court's order dismissing the torture claims is attached as appendix "D" in the Petition for Writ of Certiorari.

What distinguishes this case from the "garden-variety" expropriation by a foreign government of the assets of an American citizen, is that Argentina in this case is engaging in commercial activities in the United States using the very properties which they expropriated from the Sidermans.

In the declarations submitted by plaintiffs before the district court, and in the exhibits attached to those declarations, the Sidermans showed that Argentina solicits guests for the Hotel Gran Corona in the United States. Moreover, the Sidermans showed that the Hotel Gran Corona accepts a variety of American credit cards, including Visa, Mastercard and American Express. Every time payment is made in the hotel through these credit cards, monies flow from the United States to Argentina. Finally, the Sidermans showed that Aerolinas Argentinas, the Argentine national airline, acts as the agent for the Hotel Gran Corona in the United States. Therefore, Argentina uses the Hotel via, its agent Aerolinas Argentinas, to do business directly in the United States.

In their Complaint, the Sidermans specifically alleged that Argentina is conducting commercial activities in the United States through the expropriated Hotel Gran Corona.

> "In wrongfully holding plaintiffs' property, defendants are engaged in the commercial business of, among other things, a hotel business, since they are managing and running the INOSA hotel, Hotel Gran Corona, and deriving profits and proceeds therefrom." (para. 101).
>
> "The commercial activities of defendant described in paragraph 101-104, *supra*, include commercial activities conducted in, have

> commercial contact with, and/or a direct effect on the United States." (para. 105)
>
> "Defendants therefore have wrongfully deprived plaintiffs of their ownership rights in their properties while at the same time obtaining benefits in the United States with regard to their properties." (para. 107)

The Sidermans' causes of actions are based specifically upon the commercial activities of Argentina conducted in the United States through the Hotel Gran Corona. Therefore, contrary to Argentina's assertion (*see* Petition at 22), the Sidermans are not alleging a jurisdictional nexus to the United States based upon commercial activities of Argentina in the United States wholly unrelated to the facts of this case. Rather, as the Court of Appeals found, the commercial activities being conducted by Argentina in the United States as a result of the expropriation complained of by the Sidermans form the jurisdictional basis under which the district court has subject matter jurisdiction in this case pursuant to section 1605(a)(2) and 1605(a)(3).

1. Section 1605(a)(2)

Clause 1 of section 1605(a)(2) requires that the action of the Sidermans be "based [1] upon a commercial activity [2] carried on in the United States [by Argentina]." As the Court of Appeals found, the various commercial activities by Argentina carried on in the United States through the Hotel Gran Corona meet both of these statutory requirements. 965 F.2d at 708-09.

Contrary to Argentina's assertion (Petition at page 22), the Sidermans indeed have established "a close connection

between the cause of action asserted and the jurisdictional facts upon which it is based." (*Id.*) All of the Sidermans' expropriation claims relate to property which has been used in commercial activities in the United States. Argentina's statement that the Sidermans' suit is based upon "[o]ther contacts between a defendant foreign state and the foreign state, unrelated to a particular cause of action" (*Id.*) is wrong as a matter of fact. Moreover, to the extent Argentina presses this point, it is a matter more appropriately resolved in the district court on remand and not in this Court in the first instance.[4]

The Ninth Circuit also found that the allegations of the Complaint and supporting evidence meet clause 2 of section 1605(a)(2), which requires that the action be based "upon an act performed in the United States in connection with the commercial activity of the foreign state elsewhere." Again, the clause 2 requirements are met based upon the commercial activities of Argentina with regard to the Hotel Gran Corona. As the Ninth Circuit explains:

> "The Sidermans' causes of action for conversion, constructive fraud, intentional interference with business relationships and

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[4] Last Term, this Court agreed to hear *Saudi Arabia v. Nelson, 923 F.2d 1528 (11th Cir. 1991) cert. granted, No. 91-522*, June 8, 1992, a case from the Eleventh Circuit interpreting Clause 1 of section 1605(a)(2) of the FSIA. Petitioners argue that because *Nelson* is presently on review before this Court, the Court must likewise review the decision of this case, because it too, in part, involves interpretation of Clause 1 of section 1605(a)(2). (Petition at 22-23). To the extent the *Nelson* case is relevant to the determination of subject matter jurisdiction in this case, the district court will apply this Court's decision in *Nelson* on remand.

> breach of fiduciary duty directly relates, therefore, to Argentina's acts in this country. Argentina undertakes those acts, furthermore, in connection with commercial activity elsewhere, namely its operation of the Hotel. The Sidermans' claims thus fall squarely within clause two of the commercial activity exception.

965 F.2d at 710.

Clause 3 of section 1605(a)(2) requires that the claim must be based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." The Ninth Circuit found that the Sidermans may be able to fit their action within clause 3 if they can show that they are entitled to receive dividends in the United States from INOSA, their family-owned corporation which was expropriated from them by Argentina.[5]

Nowhere in their Brief have Petitioners shown that this application of the three clauses of 1605(a)(2) to the facts of this case by the Ninth Circuit is incorrect. Petitioners cite no case from this Court showing that the Ninth Circuit erroneously analyzed section 1605(a)(2) of the FSIA. Nor have Petitioners shown that the Court of Appeals' opinion is in conflict with the decisions of any other Circuit.

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[5] The Court of Appeals did not consider it crucial for the Sidermans to meet the requirements of Clause 3 of section 1605(a)(2), since it already found that the Sidermans had satisfied the requirements for subject matter jurisdiction under clauses 1 and 2 of 1605(a)(2). 965 F.2d at 711.

Two objections can be gleaned from Petitioners' brief, neither one of which is supported by legal authority.

First, Petitioners object to the Ninth Circuit's application of 1605(a)(2), the commercial activity exception, to claims involving takings, or expropriations, of property by a foreign government. Petitioners assert that United States courts can obtain jurisdiction over such suits only under section 1605(a)(3), the international takings exception of the FSIA. (Petition at 19.)

However, Petitioners cite no authority for the proposition that claims against foreign sovereigns arising out of international takings can only be examined under section 1605(a)(3). Nothing in the language of the FSIA, nor its legislative history, nor any decision of this Court, prevents a district court from finding subject matter jurisdiction in a case involving an international taking, when that taking leads a foreign government to carry on commercial activities which *also* meet the requirements of section 1605(a)(2). Plaintiffs' jurisdictional allegations fall squarely within the plain meaning of the FSIA.

Petitioners' second objection to the application of section 1605(a)(2) to the expropriation claims is that such a lawsuit is based "upon a quintessentially sovereign or governmental act," namely the taking or expropriation of the Sidermans' property by Argentina. (Petitioner's Brief at 23.) However, Petitioners cite no authority that prevents a district court from taking subject matter jurisdiction over a taking, or expropriation, merely because it was done by a foreign governmental authority.

Indeed, the Court of Appeals' analysis is entirely consistent with this Court's subsequent decision in *Republic of Argentina v. Weltover*, 504 U.S. ___, 119 L.Ed. 2d 394, 403-407 (1992). See 965 F.2d at 708-710. Without directly so stating, Argentina is arguing for the return of the rule of absolute sovereign immunity, namely that if an act is done by a foreign

sovereign, the foreign sovereign then cannot be sued for such an act. Obviously, this is not the law of the United States. *See Argentine Republic v. Amerada Hess Shipping Corp., supra, 488 U.S. at 434, n.1.*

2. Section 1605(a)(3)

The Court of Appeals also found that the complaint and the supporting evidence stated a basis of subject matter jurisdiction upon clause 2 of section 1605(a)(3), the international takings exception. Clause 2 of the international takings exception provides that a foreign state is not immune in an action "in which rights and property taken in violation of international law are an issue and... that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States...."

The Court of Appeals found that Argentina violated the international law of expropriation when Argentine officials seized INOSA because the Siderman family is Jewish, a discriminatory motivation based on ethnicity. 965 F.2d at 712. Moreover, INOSA was seized for the personal profit of Argentine military officials and not for any public purpose. The Court of Appeals found that such an expropriation clearly violates international law. *Id.* Argentina does not dispute this finding.

Thereafter, the Ninth Circuit found that INOSA, being wholly taken over by the Argentine government, became an "agency or instrumentality" of Argentina, as defined in section 1603(b) of the FSIA. Examining again the tourist activities of the Hotel Gran Corona, owned by INOSA, in the United States, the court found that the final requirement under Clause 2 - that the agency or instrumentality must be engaged in a commercial activity in the United States - is also met.

Argentina alleges that this analysis by the Ninth Circuit is "invalid." (Petition at 21.) Argentina, however, fails to provide a single authority for this statement. Again, Argentina points to no language of the FSIA, or its legislative history, or any decision of this Court, or of any other Circuit in support of this argument.

B. Torture Claims

With rhetorical flourish, Petitioners accuse the Court of Appeals of "sitting in judgment on acts performed by foreign states in their own territories," (Petition at 25), "examining the 'democracy quotient' of foreign governments" (*Id.* at 25-26), "exporting United States law into the territories of foreign states," (*Id.* at 26), and even "assum[ing] the role of a surrogate for the President and the Secretary of the State in the conduct of the United States' foreign relations," (*Id.*)

In fact, the Court of Appeals did nothing of the sort. Rather, its conclusion that implied waiver exists under section 1605(a)(1) is based upon the extraordinary facts of this case.

Argentina was the first to resort to courts in the United States in its efforts to continue its persecution of the Siderman family. After having filed bogus criminal proceedings in Argentina against Jose Siderman, Argentina pursued Mr. Siderman in American courts.

Under such facts, the Court of Appeals held that it was "confront[ed] [with] a situation where Argentina apparently not only envisioned United States court participation in its persecution of the Sidermans but by its actions deliberately implicated our courts in that persecution," 965 F.2d at 721-22, and found that the Sidermans met their burden under section 1605(a)(1) of the FSIA.

The Court of Appeals emphasized that its ruling on implied waiver is limited to the unique factual circumstances of this case:

> We do not suggest that because Argentina m ay have implicitly waived its immunity in this suit, any foreign sovereign which takes actions against a private party in our counts opens th e way to all manner of suit by that party. To support a finding of implied waiver, there mu st exist a direct connection between the sovereign's activities in our courts and the plaintiff's claims for relief. *Only because* the Sidermans have presented evidence that Argentina's invocation of United States judicial authority was part and parcel of its efforts to torture and prosecute Jose Siderman have th ey advanced a sufficient basis for invoking th at same authority with respect ot their cause of action for torture. It will be up to the district court to determine whether the requisite connection exists.

Id. at 722 (emphasis added)

Petitioners argue, without explanation, that the holding below contravenes this Court's opinion in *Argentine Republic v. Amerada Hess Shipping Corp.*, *supra*. (Petition at 24) In fact, the Court of Appeals decision is fully consistent with *Amerada Hess* in requiring the Sidermans to demonstrate th at the district court has subject matter jurisdiction under the specific exceptions of the FSIA.

Again, Petitioners have failed to show how the appellate court's decision contravenes the language of the FSIA, the FSIA's legislative history, or any decision of this Court or any Circuit.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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October 9, 1992

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No. 92-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

REPUBLIC OF ARGENTINA and PROVINCE OF TUCUMAN, ARGENTINA,

Petitioners,

v.

SUSANA SIDERMAN DE BLAKE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

Respondents' brief in opposition concedes, as it must, that this case involves an action against the Republic of Argentina and the Province of Tucumán (hereafter collectively "Argentina") "for (1) the taking of plaintiffs' properties and (2) the torture of plaintiff José Siderman during the military dictatorship in Argentina." (Br.Op. at 2). Respondents' complaint plainly asserted that the taking took place in Argentina and that the claimed tortious acts against José Siderman as well as his injuries occurred there. (*Ibid.*).

These record facts establish on their face that the district court lacked competence to hear respondents' claims: neither the taking of real estate in Argentina nor tortious injury of a national of Argentina in that country are justiciable under the Foreign Sovereign Immunities Act ("FSIA").[1] Tragic and painful as the regime of the military junta in Argentina was to the Argentine Nation and its people, it is irrelevant to the jurisdiction of United States courts that the harms suffered by the Sidermans were especially egregious because they were "attributable to the anti-semitism of the military in Argentina during the dictatorship." (Br.Op. at 2).[2] In enacting the FSIA, Congress did

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[1] §1604 of the FSIA unequivocally provides that a foreign state "shall be immune from the jurisdiction of the courts of the United States or of the States" unless a claim falls within one of the exceptions codified in §§ 1605-1607.

The claimed unlawful taking of real estate in Argentina is not subject to review in the courts of the United States under the exception set forth in §1605(a)(3) of the Act, nor is the tortious injury suffered by one of the respondents in Argentina justiciable in this country under §1605(a)(5). *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

[2] As we noted in the petition, shortly after the democratically elected government of President Raul Alfonsin replaced the military junta, the Argentine Congress enacted compensatory legislation to afford redress to the victims of the military regime. The respondents filed compensation claims under that legislation. (Pet.Cert. at 9-11).

Incredibly, respondents' brief in opposition treats the proceedings in Argentina with silence. Having succeeded only in part in recovering their property in Argentina (their torture claim was dismissed as time-barred), respondents seek to relitigate here all of their claims under the FSIA. In their continuing effort to have the merits of their claim adjudicated in this country, respondents have—over the strenuous objections of Ar-

not intend to turn United States courts into international human rights courts and vest them with authority to adjudicate human rights violations committed by brutal regimes abroad. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983).

The core of respondents' opposition to Argentina's petition for certiorari is twofold: they say (1) that the Ninth Circuit correctly ruled that their 53-page complaint contained sufficient allegations to make out a *prima facie* case of subject matter jurisdiction under the FSIA, thus making the remand to the district court for discovery and evidentiary hearings entirely proper, and (2), until such time as full jurisdictional discovery has been had, review by this Court is premature. (See respondents' "Question Presented"[3]). Neither contention bears scrutiny.

I. RESOLUTION OF THE ISSUE WHETHER RESPONDENTS' TAKING CLAIMS ARE COGNIZABLE REQUIRES NO EVIDENTIARY HEARING

A consistent line of decisions by this Court firmly establishes the rule that issues of immunity from suit should be resolved summarily, "for the essence of absolute immunity is the possessor's entitlement not

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gentina—now obtained leave from the district court under Rule 27(b), F.R.Civ.P., to take a merits deposition of one of the respondents. *Siderman v. The Republic of Argentina*, C.D.Cal., Civ. No. CV 82-1772-RMT, Discovery Order entered October 15, 1992 by Stone, M.J.

[3] Respondents' formulation of their "Question Presented" avoids the two questions presented in our petition for certiorari.

Under this Court's Rule 14.1(a) (1990), the Court will consider "[o]nly the questions set forth in the petition, or fairly included therein."

to have to answer for his conduct in a civil damage action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982), the *Mitchell* Court emphasized that even such pretrial matters as discovery are to be avoided if possible, as "[inquiries] of this kind can be peculiarly disruptive of effective government." 472 U.S. at 526.

The same rule has been applied by this Court to resolutions of issues of foreign sovereign immunity. Thus, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Court's determination that none of the FSIA's exceptions to foreign sovereign immunity applied in that case was predicated solely on the facts alleged in the complaint.[4]

Similarly, the lower federal courts have as a rule determined jurisdictional challenges by foreign states on the basis of the factual allegations in the complaint, and indeed, the Ninth Circuit has followed that practice. See *Compania Mexicana de Aviacion v. U.S. Dist. Court*, 859 F.2d 1354 (1988). Only in rare instances have the lower courts permitted limited, jurisdictional discovery before passing on a foreign sovereign's jurisdictional challenge—usually, when the factual predicate for the exercise of subject matter jurisdiction required a determination whether a foreign sovereign engaged in a commercial activity that had a substantial nexus with the United States, as that term is defined in the FSIA, and whether the claim asserted by the plaintiff arose out of that com-

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[4] Justice Blackmun, with whom Justice Marshall joined, did not join in that part of the Court's opinion holding that none of the FSIA's exceptions applied. He would have remanded the case to the Court of Appeals on this issue. 488 U.S. at 443-44.

mercial activity.[5] This case presents no occasion for such a factual inquiry. In consequence, respondents' opposition to the petition on the ground that Argentina should first be subjected to broad-reaching discovery on the jurisdictional issues is not well founded.[6]

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[5] See, e.g., *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332-33 (2d Cir. 1990) (limited discovery allowed on question whether a Soviet entity negligently overhauled a Polish aircraft in the United States, contributing to its crash in Poland); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451-52 (6th Cir. 1988) (limited discovery allowed on question whether theft of trade secrets by French government-owned company was accomplished partly through negotiations in the United States with Gould's former employee), *cert. dismissed sub nom. Pechiney and Trefimetaux v. Gould, Inc.*, ___ U.S. ___, 112 S.Ct. 1657, 118 L.Ed.2d 317 (1992); *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982) (limited discovery allowed on question whether companies owned by Irish government enticed the plaintiff in the United States to go to Ireland to work for them and then stole his patent rights and expertise).

[6] The Ninth Circuit criticized the district court for originally dismissing the respondents' taking claims on act of state grounds "before Argentina had even entered an appearance in the case" (Pet. App. at 24a, 965 F.2d at 713), and that the district court had "*made no findings of fact* concerning jurisdiction" with respect to these claims. (Pet. App. at 12a, 965 F.2d at 707; emphasis added).

Respondents seize upon this language and urge that "[i]t would be premature for this Court to grant certiorari at this point in this case" and that "the Court should allow this case to be remanded to the district court, so that [it] can proceed with the task of determining whether it has subject matter jurisdiction over the Sidermans' taking claims." (Br. Op. at 11).

Respondents are wrong. Whether the FSIA confers authority and competence on a court to review a taking of real estate by a foreign state within its territory—as expressly asserted in respondents' complaint—presents a pure question of law and

II. THE COURT OF APPEALS' UNPRECEDENTED AND GROTESQUE HOLDING THAT ARGENTINA WAIVED ITS IMMUNITY FROM SUIT FOR THE TORTURE CLAIM MERITS IMMEDIATE REVIEW BY THIS COURT

Respondents contend that the Court of Appeals' conclusion that an implied waiver exists under section 1605(a)(1) "is based upon the extraordinary facts of this case," and does not merit review. (Br.Op. at 19). Not so.

Rather than being "extraordinary," the *facts* are simple and straightforward. The record establishes that some two years before respondents instituted this action in the district court, a provincial court in Tucumán sent a letter rogatory to a State court in Los Angeles and requested that certain documents relating to an action filed against respondent José Siderman in the requesting court be sent to him "so as to advise [him] of the pendency of said action in Argentina." The State court mailed the document to Mr. Siderman and informed him that it was doing so "as a matter of judicial cooperation and comity." The transmittal letter stated that the court "express[ed] opinion as to the legal effect of this suit or the effect of our sending these documents on to you. (Pet.App. 58a).[7]

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plainly requires no "findings" of fact. Reviewing courts have traditionally considered plaintiff's *factual allegations* in resolving immunity issues. *Mitchell v. Forsyth*, *supra*, 472 U.S. at 529. *Argentine Republic v. Amerada Hess Shipping Corp.*, *supra*, 488 U.S. at 439-41.

[7] The record below further establishes that the action brought against Mr. Siderman in the Tucumán provincial court was thereafter discontinued or dismissed even before the instant suit was filed.

The respondents urged on appeal, and the Court of Appeals held, that the Tucumán court's letter rogatory constituted "part and parcel of [Argentina's] efforts *to torture* and prosecute José Siderman" in the United States (Pet.App. at 43a, 965 F.2d at 722; emphasis added), and that therefore Argentina waived its immunity from suit by Mr. Siderman for torture in all United States and State courts. Respondents oppose certiorari to review this bizarre waiver holding stating that "[Argentina] has failed to show how the appellate court's decision contravenes the language of the FSIA, the FSIA's legislative history, or any decision of this Court or any Circuit." (Br.Op. at 20).

Implied waivers of sovereign immunity have been uniformly narrowly construed by the Circuit Courts. See *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377-78 (7th Cir. 1985) (citing and discussing the relevant case law). The Court of Appeals' implied waiver holding in this case perverts the express counterclaim provision of the FSIA[8] and offends logic and reason. If left standing, a foreign state that litigates with a private party in one of its courts will be deemed to be subject to the jurisdiction of United States courts with respect to the subject matter of that litigation if its court dares to send a request for judicial assistance to a U.S. court. The Court of Appeals' "waiver" theory would be destructive of the substantial progress the United States has made in

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[8] Under § 1607 of the FSIA, a foreign state that *brings an action or intervenes in an action in a federal or state court* is denied immunity from counterclaims and setoffs under the conditions specified in that section. The section codifies the rule enunciated by this Court in *National Bank v. Republic of China*, 348 U.S. 356 (1955).

the last three decades in promoting international judicial assistance,[9]

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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[9] See, e.g., the extensive 1964 revisions of the Judicial Code regarding international judicial assistance, 28 U.S.C. §§ 1696, 1971-1972; the 1969 ratification by the United States of the Hague Service Convention, 20 U.S.T. 361, T.I.A.S. No. 6638; the 1972 ratification by the United States of the Hague Evidence Convention, 23 U.S.T. 2555, T.I.A.S. No. 7444; the 1988 ratification by the United States of the Inter-American Letters Rogatory Convention and Additional Protocol, ___ U.S.T. ___, T.I.A.S. No. ___, OAS Treaty Series Nos. 43 and 56; and the 1990 signature by the United States of the Inter-American Evidence Convention and Additional Protocol, OAS Treaty Series Nos. 44 and 65.